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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARION COUNTY SCHOOL DISTRICT; MARION COUNTY SCHOOL BOARD: SAM MANSFIELD, Chairman; LAMAR LUFFMAN, Vice Chairman; CAROL A. PARRISH, Member; J. L. COLLUM, Member; NATHAN GILMAN, Member; H. LEON ROGERS, Superintendent, Marion County School District, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States may bypass the conditions precedent established by Title IV of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000c-6 (1976), and the anti-busing proscriptions of the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701 *et seq.* (1976) and subsequent appropriations legislation, by suing a School District for specific performance of an "Assurance of Compliance" submitted to HEW in 1966.

2. Whether the submission by a School District of an Assurance of Compliance form, which, since December 4, 1964, HEW has required of all school districts receiving federal financial assistance, subjected the School District, in perpetuity, to a specifically enforceable contract obligation to satisfy new HEW standards for school desegregation if

(i) HEW indicated to the School District, after the Assurance was filed, that the District was in compliance with federal standards for receipt of federal financial assistance;

(ii) the United States' lawsuit is based upon new desegregation standards which became effective five years after the School District's Assurance of Compliance was initially accepted by HEW;

(iii) the Assurance of Compliance explicitly provided that a School District could "notify" HEW that it would not comply with a new amendment to HEW's desegregation guidelines; and

(iv) the School District promptly notified HEW that it disagreed with the new desegregation standard.

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v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-24a, *infra*) is reported at 625 F.2d 607. The opinion of the United States District Court for the Middle District of Florida (Pet. App. B, pp. 25a-60a, *infra*) is not reported.

JURISDICTION

The order of the court of appeals reversing the district court's dismissal of the complaint (Pet. App. C, pp. 61a-62a, *infra*) was entered on September 10, 1980. On October 23, 1980, the court of appeals denied a timely petition for rehearing and rehearing *en banc.*

(Pet. App. D, pp. 63a-64a, *infra*). On January 9, 1981, Justice Powell entered an order extending the time within which to file a petition for a writ of certiorari to and including February 20, 1981 (Pet. App. F, p. 65a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES AND REGULATIONS INVOLVED

The applicable statutes and regulations are reprinted in Pet. App. G, pp. 69a-78a, *infra*.

STATEMENT

This is a contract action brought by the United States to obtain specific performance of "Assurances of Compliance" filed by the Marion County School District[1] with the Department of Health, Education and Welfare ("HEW") in April 1966 and in October 1970 as part of HEW's administration of Title VI of the Civil Rights Act of 1964. The lawsuit was brought because HEW concluded that, with respect to two of the 31 schools in the Marion County system, "a complete remedy" for racial segregation requires "transportation of some students to a school other than the one closest to their home"—*i.e.*, busing of students. Since HEW is now prohibited by legislative en-

[1] Marion County is located in northern Florida, and has a population, according to the 1980 census, of 118,800. Its only substantial municipality is Ocala, with a population of 35,903. The county is otherwise rural, and its principal industries are farming and horse breeding. The County's public-school student population in 1977-78 was 21,497, of whom approximately 30 percent were black. Ninety-six percent of the enrollment, including more than 86 percent of the District's black students, attended schools which were not challenged by the government's lawsuit.

actment from enforcing student busing by administrative action, it referred this case to the Department of Justice for the initiation of a lawsuit on the novel legal theory that the submission of an "Assurance of Compliance" gave the United States a specifically enforceable contract right to secure any desegregation remedy which a private party might obtain. The central issue at this juncture of the case—decided favorably to petitioners by the district court but reversed by the court of appeals—is whether a "boilerplate" Assurance of Compliance gives rise to a contract right enforceable by the United States in federal court to desegregate public schools by busing. A brief summary of the undisputed facts, as they emerge from the HEW administrative record [2] and from the documents submitted to the district court, places the issue in perspective.

1. The District's Initial Desegregation Plan

Following the enactment of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d *et seq.* (1976), HEW issued regulations, effective December 4, 1964, which required every public elementary and secondary school system in the United States to submit an "Assurance of Compliance" pledging that the school system would comply with Title VI and HEW regulations promulgated thereunder, in order to be eligible to receive federal financial assistance. 29 *Fed. Reg.*

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[2] *In the Matter of Marion County School District and State Department of Education, Florida*, No. CR-S-26. The record of this proceeding, a copy of which is being lodged with the Court, is hereinafter cited as "H.R." Government exhibits in the administrative proceeding are "H.R. G. Ex." and the District's exhibits are "H.R. R. Ex." The administrative transcript is "H.R. Tr." The record in the district court is hereinafter cited as "R."

16298 (1964), *presently codified at* 45 C.F.R. §§ 80 *et seq.* (1979). The Marion County School District had operated a racially segregated school system prior to 1965. In that year, after discussions with HEW, it adopted a "freedom-of-choice" school assignment plan, which HEW then accepted as satisfactory under Title VI for receipt of federal funds for the 1965-66 school year. H.R. Tr. 9-12.

2. Submission of the 1966 Assurance

Following this approval, the District submitted in 1966 an "Assurance of Compliance" on Form 441-B. H.R. G. Ex. 1B (Pet. App. H, pp. 79a-81a, *infra*). On April 20, 1966, HEW advised the District that its desegregation plan, together with the filed Assurance, "may now be considered adequate for the coming school year to accomplish the purposes of Title VI of the Act" and to authorize "the payment of Federal financial assistance at this time." H.R. G. Ex. 1.

3. The 1968 Desegregation Plan

In 1968, the District revised its desegregation plan by, *inter alia,* replacing its freedom-of-choice student assignment policy with geographic attendance zones. The change was to be accomplished over a two-year period, with completion slated for September 1969. On June 26, 1968, after a field review and extensive discussions with the District's superintendent, HEW approved the revised desegregation plan. It found that the District "continued to be eligible for Federal assistance for the 1968-69 school year." H.R. G. Ex. 2.

4. HEW's 1969 Approval

After again conducting an exhaustive review of the District's desegregation plan, including another detailed on-site examination of the school system, HEW advised in a letter of October 9, 1969, that the District had fully implemented its desegregation plan and was "now operating a unitary, non-racial school system in which no schools are racially identifiable." It "commended" the District "for the leadership [it had] shown in meeting the provisions of Title VI of the Civil Rights Act of 1964, and, even more important, providing an equal educational opportunity for all of the students in [its] district." The HEW letter also stated that the District's "441-B Assurance of Compliance will remain in effect and provide a basis for the approval of applications and for payment of Federal financial assistance." H.R. G. Ex. 3.

In view of HEW's conclusion, the District was asked to execute Form 441, the form of "Assurance of Compliance" applicable to school systems which do "not maintain any aspect of a dual school structure." *See* 45 C.F.R. § 181.5 (1967).[3] The HEW letter also requested racial data on student enrollment and faculty assignment, and advised that "if the information contained in the compliance forms for the coming year shows that full compliance has been maintained, your form 441 will be accepted." H.R. G. Ex. 3.

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[3] Form 441-B, which the District had previously filed, was the form to be submitted by those school systems which had adopted voluntary desegregation plans that had not yet achieved full compliance with Title VI. *See* 45 C.F.R. § 181.7 (1967).

5. HEW's 1971 Rejection

On October 14, 1970, the District submitted its executed Form 441 with the additional requested material.[4] HEW then conducted another compliance review. On April 8, 1971, HEW reversed its earlier decision and said that the District was "not yet" complying with Title VI because "racially identifiable schools continue to exist in the district." The offered Form 441 was, accordingly, rejected. The HEW letter specified that the assignment of faculty and staff was deficient and that student bodies of "several schools" were "racially identifiable." H.R. G. Ex. 5.

On June 18, 1971, after another on-site review of the school system, HEW sent a letter to the District interpreting this Court's decision of April 20, 1971, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The letter stated that this Court's decision "required" school authorities to consider "all available student assignment techniques, including those of contiguous and non-contiguous attendance zoning, and the transportation of students to those zones" in developing desegregation plans. The HEW letter also said:

> To the extent that policies issued by this Office in the past may conflict with or are different from rulings by the Supreme Court, the Court's holdings, of course, must prevail.

The HEW letter directed the District "to develop and implement a new desegregation plan at the beginning of the 1971-72 school year." It then enumerated

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[4] The Form 441, submitted on October 15, 1970, was reprinted as an appendix to the opinion of the court of appeals. It appears at pp. 23a-24a, *infra*.

various available desegregation methods, including revision of attendance zone boundaries, non-contiguous zoning, and pairing or clustering of schools. H.R. G. Ex. 6.

6. HEW's Administrative Proceeding

Following a further exchange of correspondence, the District advised HEW on July 30, 1971, that in its view it was "operating a unitary non-racial school system" and would make no other changes in student assignment practices. H.R. R. Ex. 5. No other action was taken by HEW until the United States District Court for the District of Columbia, in *Adams v. Richardson*, 356 F.Supp. 92 (D.D.C.), *modified* and *aff'd*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*) (*per curiam*), ordered HEW to initiate fund-termination proceedings against public school districts which had failed to satisfy its desegregation guidelines. HEW advised the District of this ruling on March 24, 1973. H.R. G. Ex. 8. The District responded with a plan which proposed changes in student assignment rules, but did not provide for busing or non-contiguous zoning. H.R. R. Ex. 8. HEW found the proposed plan inadequate and pursued its administrative remedy to terminate federal funding of the District's schools. H.R. G. Ex. 10.

After a hearing, the Administrative Law Judge ruled on November 14, 1973, that the District "is now in compliance with the constitutional guidelines." H.R. Initial Decision, pp. 29-30. He observed that "residential segregation has contributed 'to disproportionate racial concentrations in some schools,'" and rejected the suggestion that the District must bus students to achieve desegregation (*id.*, pp. 31, 33). His conclusion was that "Marion County is operating a

unitary school system consistent with constitutional requirements" (*id.*, p. 34).

7. Review at HEW

The HEW General Counsel sought reversal of the initial administrative decision on the principal grounds that the District still had schools which were racially identifiable by their student enrollment, and that busing was an available remedy. The HEW Reviewing Authority (Civil Rights) reversed the initial decision on July 26, 1975, finding that two schools which had more than 97 percent black student populations were "clearly racially identifiable." It remanded the case for further proceedings "to ascertain whether or not remedies are available" under judicial authority and under the "Esch Amendment" to the Equal Educational Opportunities Act of 1974, which had been enacted on August 21, 1974. Pub. L. No. 93-380, § 215(a), 88 Stat. 517, *codified at* 20 U.S.C. § 1714(a) (1976). The Secretary of HEW denied secretarial review on December 27, 1976, noting that the Reviewing Authority had "significantly . . . entered no order excluding the School District from further Federal financial assistance."

8. Termination of the Administrative Proceeding

While the remanded administrative proceeding was pending before the Administrative Law Judge, Congress enacted various laws limiting the authority of HEW to require busing of students as part of a desegregation remedy. *See* Pub. L. No. 94-206, § 209, 90 Stat. 22 (1976); Pub. L. No. 94-439, § 208, 90 Stat. 1434 (1976). As a result of the enactment of such a provision for 1978 (Pub. L. No. 95-205, 91 Stat. 1460

(1977)), HEW's Office of Civil Rights determined that the pending administrative action could not be pursued. The Director of the Office of Civil Rights found that

> A complete remedy for the District's violation of the Fourteenth Amendment and of Title VI cannot be provided without transportation of some students to a school other than the one closest to their home.

Citing the legislative prohibition against use of appropriated funds "to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home," HEW said it was "obliged" to request the Justice Department "to seek appropriate judicial relief" and referred the matter for institution of this action.[5] The administrative proceeding was then dismissed on April 21, 1978.

9. Proceedings in the District Court

On May 23, 1978, the United States filed a complaint seeking specific performance of the Assurances.[6] Petitioners moved to dismiss, and on August 11, 1978, the district judge granted the motion to dismiss with a

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[5] The full letter referring the proceeding from HEW to the Department of Justice appears as Pet. App. I, pp. 83a-86a, *infra*.

[6] Although paragraph 1 of the Complaint cited the Civil Rights Act and the Fourteenth Amendment, the government conceded in the district court that the theory of its action turned entirely on contract (pp. 3a & n. 3, 29a-30a, *infra*). The Complaint referred to *both* the 1966 and 1970 Assurances, but it attached only the 1970 Assurance as an exhibit. In fact, the 1970 Assurance was never accepted and could not, therefore, be the basis of a contract claim. *See* 1 Corbin, *Contracts* § 55 (1963).

28-page opinion in which he held that "there is no statutory authority, and corresponding jurisdiction, for this particular lawsuit . . . based solely on the specific enforcement of statutorily required, contractual nondiscrimination assurances. . . ." (p. 58a, *infra*). Following a comprehensive review of the legislative history of Title VI of the Civil Rights Act of 1964 and of subsequent legislation, the district court found that Congress (p. 54a, *infra*)

> persistently and repeatedly rejected attempts to provide remedies under Title VI by means of lawsuits to enforce contractual assurances of nondiscrimination. At the same time, Congress provided for an administrative fund-termination procedure, as well as the use of other existing administrative means and lawsuits available under statutes independent of Title VI. In its more recent legislative activity, Congress has demonstrated its judgment that desegregation remedies involving busing of students are inappropriate for violations of federal statutes, even though the disbursement of federal funds is conditioned under those statutes upon compliance with their non-discrimination requirements.

On the basis of this history, the district court concluded that the "specific and exclusive" remedies contemplated by Title VI preclude the maintenance of this contract action.

10. The Decision of the Court of Appeals

The court of appeals reversed on the ground that "the United States has authority to fix the terms and conditions upon which its money allotments to state and other governmental entities should be disbursed," and that the United States has "an inherent right to

sue for enforcement of the recipient's obligation in court" (p. 3a, *infra*). With regard to the legislative history cited by the district court, the court of appeals said that there was (p. 8a, *infra*)

> no persuasive, much less unmistakable, evidence that Congress intended to eradicate or even restrict the United States' right to sue to enforce contractual assurances of nondiscrimination in the operation of public schools.

REASONS FOR GRANTING THE WRIT

I

The Decision of the Court of Appeals Unjustifiably Expands the Federal Government's Role in School Desegregation Litigation Contrary to Congress' Policy

The unprecedented decision of the court of appeals effectively removes all federal statutory preconditions on the authority of the Executive Branch to file desegregation lawsuits or to seek busing as a remedy for alleged racial discrimination in the operation of local public schools. In 1964, and again in 1974, Congress engaged in substantial debate and compromise before empowering the federal government to initiate or intervene in judicial proceedings aimed at desegregating public schools. On each occasion, Congress granted litigation authority, but only on specified conditions precedent.

Moreover, in 1974, and on four occasions thereafter, Congress deliberately and explicitly narrowed the authority of the Executive Branch to seek a busing remedy—*i.e.*, the transportation of students to schools other than those nearest their homes. The decision of the court of appeals overrules that conscious legislative choice by authorizing the federal government to bring

an action for "transportation relief" if it does so in the form of a suit for specific performance of the "Assurance of Compliance" which all the Nation's school districts have had to file with the appropriate federal department [7] to secure federal funding.

Fifty state education agencies and approximately 16,000 local school districts have submitted Assurances under Title VI of the Civil Rights Act of 1964. *See* Department of Education, Office of Civil Rights, *Annual Operating Plan for Fiscal Year 1981*, 46 *Fed. Reg.* 5034, 5036 (1981). The decision of the court of appeals subjects all these agencies to the prospect of contract suits by the United States for any form of desegregation relief and under any constitutional standard which the Executive Branch believes to be proper, regardless of Congress' limitations, incorporated in federal law, on the authority of the federal government to sue or to seek particular relief.

When Congress first authorized the federal government to institute public-school desegregation actions in Title IV of the 1964 Civil Rights Act, it enumerated several preconditions for such action. Section 407, Title IV, 42 U.S.C. § 2000c-6 (1976), specifies *first* that the Attorney General must receive "a complaint in writing . . . signed by a parent or group of parents to the effect that his or their minor children . . . are being deprived by a school board of the equal protection of the laws . . . ," *second*, that the Attorney Gen-

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[7] During the times relevant to this lawsuit, such Assurances were filed with HEW. Since May 9, 1980, when the Department of Education was created, the Assurances have been filed with the Office of Civil Rights of that Department. *See* Department of Education Organization Act, Pub. L. No. 96-88, §§ 203(a), 301 (a)(3), 93 Stat. 668 (1979); 45 *Fed. Reg.* 30802 (1980).

eral must believe that "the complaint is meritorious" and certify "that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings and that the institution of an action will materially further the orderly achievement of desegregation in public education," and *third,* that the Attorney General must give notice of the complaint "to the appropriate school board" and certify "that he is satisfied that such board . . . has had a reasonable time to adjust the conditions alleged in such complaint . . ." Only after all these conditions have been satisfied may the Attorney General "institute . . . a civil action . . . against such parties and for such relief as may be appropriate . . ."

These conditions precedent are an important part of the statutory design. Sensitive to the fact that public education was traditionally left to local control, Congress intended to give the United States only *limited* authority to bring such actions. *See* 110 *Cong. Rec.* 1518-19 (1964) (remarks of Rep. Celler); 110 *Cong. Rec.* 6838-39 (1964) (remarks of Sen. Cooper). The legislative history of the Civil Rights Act of 1964 is replete with statements emphasizing the significance of these procedural safeguards of Title IV.[8]

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[8] Two strong proponents of civil rights legislation emphasized these safeguards. Senator Douglas stated (110 *Cong. Rec.* 6815 (1964)):

> [T]itle IV gives the Attorney General limited authority—I emphasize the phrase "limited authority"—to initiate suits in the Federal district courts in order to bring about desegregation in public schools and colleges.

In colloquy with Senator Douglas, Senator Humphrey said the following with respect to the statutory limitations on "the powers which the Attorney General has been given" (*Id.*):

> They explicitly outline the terms of the procedural use of such powers. Such procedural requirements are, in fact, a

By the same token, the Equal Educational Opportunities Act of 1974 (hereinafter "EEOA"), 20 U.S.C. §§ 1701 *et seq.* (1976), sets forth enumerated conditions and specific prohibitions relating to desegregation litigation initiated by the United States. While authorizing the Attorney General to institute a civil suit to remedy a violation of the equal educational opportunities guaranteed by the Act even without a parental complaint (20 U.S.C. § 1706), the EEOA unequivocally prohibits judicial or administrative orders for "the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence. . . ." 20 U.S.C. § 1714(a).

The circumvention of Congressional policy achieved by this lawsuit is aggravated by the fact that HEW has been expressly prohibited, at least since 1974, from seeking a busing remedy for school desegregation. The "Esch Amendment" (Pub. L. No. 93-380, § 215(a), 88 Stat. 517, *codified* at 20 U.S.C. § 1714(a) (1976)) was followed by several versions of the "Byrd Amendment" (Pub. L. No. 94-206, § 209, 90 Stat. 22 (1976); Pub. L. No. 94-439, § 208, 90 Stat. 1434 (1976); Pub. L. No. 95-205, §§ 101, 106, 91 Stat. 1460 (1977)) and finally by the "Eagleton-Biden Amendment" to the 1978 HEW Appropriations Act (Pub. L. No. 95-480, § 209, 92 Stat. 1586 (1978)). Even if the court of

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conditioning of the use of the powers?

Senator Douglas replied, in terms distinctly applicable here:

> Exactly. Otherwise the Attorney General might roam at random.

Senator Humphrey then concluded that "instead of giving the Attorney General alleged dictatorial powers,"

> the bill provides that the Attorney General's powers shall be used in a moderate, regular, uniform, limited manner.

appeals were correct in concluding that these restrictions do not literally apply to an Attorney General's desegregation lawsuit, the result reached below is a patently anomalous one: HEW is forbidden to seek busing as an administrative remedy, but may use the Assurance filed with HEW as a basis for a suit by the United States seeking a judicial busing order.

This Court should grant review in this case to decide whether the court of appeals was correct in ruling that, notwithstanding the carefully crafted statutory limitations in the 1964 and 1974 Acts and the subsequent busing limitations, the Executive Branch has an "inherent right" to sue for "transportation relief" merely because it obtained "Assurances of Compliance" in administering Title VI of the Civil Rights Act of 1964. Title VI generally prohibits exclusion or denial of benefits on grounds of race, color or national origin with respect to "any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d. The 1964 Act empowers federal agencies administering federally funded programs to adopt nondiscrimination regulations and specifies the following means whereby "compliance" with such regulations "may be effected" (42 U.S.C. § 2000d-1):

> (1) by the termination or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement . . . or (2) by any other means authorized by law; . . .

The court of appeals erred when it interpreted the "other means authorized by law" language to include "government suits to enforce contractual assurances of the kind filed by the United States here" (p. 10a, *infra*). Even if this statutory language generally em-

powers the United States to bring a suit for specific performance of a term or condition attached to a grant of public funds,[9] the words "authorized by law" surely

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[9] The court of appeals relied on regulations issued in 1964 and 1966 by HEW and the Department of Justice, respectively, indicating that these Executive Branch Departments contemplated the possibility of lawsuits "to enforce . . . any assurance or other contractual undertaking" (45 C.F.R. § 8018(a) (1964)), or "to obtain specific enforcement of assurances" (28 C.F.R. § 50.3 (1966)) (see p. 11a, n. 13, *infra*). In fact, the language was not designed to grant such authority. Senator Pastore, a Senate floor manager who provided the most comprehensive statement of the justification for the inclusion of Title VI in the 1964 Act (110 *Cong. Rec.* 7054-7064 (1964)), initially explained the "other means authorized by law" language to mean only "that there shall be no repeal of laws which Congress has already enacted." *Id.* at 7060. He clearly expressed his understanding that civil actions to desegregate public schools by court order would be brought under Title IV, which was specifically drafted to treat that problem. He explained (*id.*, emphasis added):

> If voluntary means [of obtaining compliance with Title VI] fail, . . . the agency has a choice. On the one hand, it can terminate the grant, loan, or contract, refuse further payment under it, refuse to make a new grant or loan, or refuse to enter into a new contract.
>
> Alternatively, *the agency may use any other means authorized by law* . . . Perhaps the *best example* of this *relates to school lunches or other assistance to segregated schools.* Cutoff of the lunches or other assistance will obviously impose a severe hardship upon students who are intended to be benefited. One way to avoid such a hardship will be for the Attorney General to *institute a desegregation suit under title IV rather than to terminate the assistance.*

Senator Pastore did *not* suggest that an action to enforce an HEW Assurance of Compliance would be an appropriate means of obtaining public-school desegregation. He spoke, rather, of an action under Title IV. When he made the observation upon which the government and the court of appeals rely heavily (see p. 10a, n. 12, *infra*) regarding an agency's ability "to bring suit to enforce its contract," he was speaking in general terms and did

exclude authority which Congress deliberately withheld from the Executive Branch in enacting other Titles of the 1964 Civil Rights Act. Consequently, this case is totally dissimilar from civil rights lawsuits sounding in contract brought by the federal government against local agencies to obtain remedies not otherwise covered by the 1964 Act. *E.g., United States* v. *Harrison County, Mississippi,* 399 F.2d 485 (5th Cir. 1968), *cert. denied,* 397 U.S. 918 (1970) (public use of a federally financed beach); *United States* v. *Mattson,* 600 F.2d 1295 (9th Cir. 1979) (state operation of mental retardation facilities); *United States* v. *Frazer,* 297 F.Supp. 319 (M.D. Ala. 1968) (recruitment, hiring and promotion of state administrative personnel); *United States* v. *Sumter County School District,* 232 F.Supp. 945 (E.D.S.C. 1964) (public education for children on U.S. Air Force base); *United States* v. *Prince George County School Board,* 221 F.Supp. 93 (E.D. Va. 1963) (availability of public schools for children on U.S. military base).

Having provided comprehensively in Title IV for the federal government's authority to participate in

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not indicate that a contract action might be filed to achieve desegregation of public schools.

Similarity, Senator Ribicoff, another proponent of the Civil Rights Act of 1964, indicated that a Title IV suit would provide the appropriate remedial action in addition to administrative fund-termination proceedings for segregated public schools. He stated (110 *Cong. Rec.* 7066, emphasis added):

> If enforcement action . . . [is] warranted, the agency . . . [must] make its choice of appropriate remedies . . . The remedies provided by section 602 are withholding of assistance and any other means authorized by law. . . . *Looking first to the "other means authorized by law,"* the agency could, for example, *ask the Attorney General to initiate a lawsuit under title IV, if the recipient were a school district* . . .

litigation to desegregate local public schools, Congress could not have been intending to grant power in Title VI which it deliberately withheld in Title IV. When two statutory provisions have a common origin, it should be presumed that they are "meant to be, and are, complementary." *Examining Board of Engineers* v. *Flores de Otero,* 426 U.S. 572, 583 (1976); *citing Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 453 n. 7 (1972). Since Title IV deals specifically with the subject of public-school desegregation, its enumerated limitations govern over the more general directives of Title VI.[10]

The contrary reasoning of the court of appeals conflicts with the rationale of the Court of Appeals for the Sixth Circuit in *United States* v. *School District of Ferndale,* 577 F.2d 1339 (6th Cir. 1978). In the *Ferndale* case, the United States attempted to assert constitutional claims in an action under the 1974 EEOA. The court of appeals rejected that effort for reasons which would require dismissal of this Title VI suit (577 F.2d at 1345-1346):

> Prior to enactment of the EEOA, Congress had already provided a method for the Attorney Gen-

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[10] An analogous question was before this Court in *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973), where State prisoners invoked 42 U.S.C. § 1983—which literally covered their complaint—rather than relying upon the habeas corpus remedy provided in 28 U.S.C. § 2254. This Court concluded that "despite the literal applicability" of Section 1983, the "specific determination" of Congress in the habeas corpus provision "must override the general terms of § 1983." 411 U.S. at 490. *See Busic* v. *United States,* 446 U.S. 398, 406 (1980); *Radzanowner* v. *Touche Ross & Co.,* 426 U.S. 148, 153 (1976); *Morton* v. *Mancari,* 417 U.S. 535, 550-551 (1974); *Bulova Watch Co., Inc.* v. *United States,* 365 U.S. 753, 758 (1961); Sutherland, *Statutory Construction,* § 51.05, p. 315 (4th ed., 1973).

> eral to assert equal protection violations in school desegregation cases. Under Title IV, § 407, of the Civil Rights Act of 1964, the Attorney General may bring such an action only after receiving a signed complaint from a parent or parents, and only after determining (1) that the complaint is meritorious, (2) that the signer(s) of the complaint is unable to initiate and maintain appropriate legal proceedings for relief, and (3) that institution of an action will materially further orderly achievement of desegregation in public education. . . . The construction [of the EEOA] urged by the United States would allow the Attorney General to circumvent all of these requirements simply by filing suit under the EEOA instead of Title IV. There is no language in the EEOA suggesting that Congress intended such an implied repeal of § 407 procedures.

If Congress was not repealing the preconditions enumerated in Title IV when it enacted the EEOA in 1974, it surely was not intending to repeal those preconditions when it adopted Title VI in 1964. Nonetheless, the decision of the court of appeals in this case, unless promptly reversed, will have precisely that effect.

II

The Court of Appeals' Misinterpretation of HEW's "Assurance of Compliance" Form Erroneously Expands the Authority of the Attorney General Far Beyond the Expectations of the Parties to These Assurances

The first question discussed in this Petition would be presented by this case even if the standard Assurance of Compliance Form distributed by HEW had contained an explicit undertaking, expressly valid in perpetuity and judicially enforceable, to abide by

school desegregation standards as they developed in succeeding years. Our contention at pp. 12-19, *supra*, is that HEW was given no authority by Title VI to impose such contracts on local school boards as a condition of federal financing because such unilaterally developed legal obligations would circumvent the meticulous legislative compromises which led to the enactment of Title IV.

Additional questions are presented in cases invoking the HEW Assurances, however, because the language of the Assurances does not support the broad interpretation given them by the court of appeals. The 1966 Assurance is an undertaking to comply with Title VI requirements which had theretofore been announced and with future amendments "unless after the publication of any such amendment the Applicant shall notify the Commissioner that it does not intend to operate a voluntary plan for desegregation in accordance with such an amendment" (p. 79a, *infra*).

The time period for such general compliance is not expressly defined in the Assurance. The only specification regarding duration appears in the second paragraph of the Assurance. This provision declares that if real property is provided or improved with federal funds the Assurance is to be obligatory "for the period during which the real property . . . is used" and that if personal property is provided, the Assurance continues "for the period during which [the School District] retains ownership or possession of the property" (p. 79a, *infra*). Otherwise the Assurance is valid only "for the period during which the Federal financial assistance is extended to [the School District]." This

same time limitation appears in the applicable regulations. 45 C.F.R. § 80.4(a) (1979).

Federal financial assistance is granted to local school districts by the Department of Education on an annual basis.[11] Although each year's application renews any applicable representations or assurances previously made, by virtue of the Assurance's second paragraph specifying the duration of the agreement, the term of the contracting parties' mutual obligations is only a single year. *See, e.g., N.L.R.B.* v. *Cone Mills Corp.*, 373 F.2d 595, 598 (4th Cir. 1967) ("It is axiomatic in contract law that parties are relieved of their mutual obligations upon termination of the agreement."); *Addison Terry Co., Inc.* v. *N.F.L. Films, Inc.*, 390 F. Supp. 621, 623 (S.D.N.Y. 1974) (although party "may have envisaged a continuing relationship" with other party to contract, and no time limitations were expressly stated in the contract, parties did not bargain for contractual relationship covering more than one football season, and consequently contract was restricted to that season and expired by its own terms); *Morgan Drive Away* v. *International Brotherhood of Teamsters*, 166 F.Supp. 885, 890 (S.D. Ind. 1958), *aff'd*, 268 F.2d 871 (7th Cir. 1959) (contract did not contemplate performance in perpetuity; "having been fully performed by both parties thereto [it] is terminated and cannot be the basis of [an] action [in contract]"); 17A C.J.S. § 385(1), pp. 454-57 and cases cited therein (1963); 2 *Restatement of Contracts*, § 386 (1932). In these circumstances it is clear that under

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[11] *See*, Section 434 of the General Education Provisions Act, *as amended*, 20 U.S.C. §§ 1232c(b)(1)(A), (b)(1)(B), (e) (1976); 45 C.F.R. §§ 100b.10, 100b.18, 100b.36, 100b.55 (1979).

general principles of contract law, a school district submitting an Assurance was bound only from year to year. Its Assurance, once submitted, did not subject it to desegregation obligations in perpetuity.

Consequently, a breach of such an Assurance did not entitle the United States to a remedy extending beyond the period of the School District's contractual undertaking. The remedy of "specific performance," however, would require the School District to comply with standards currently enforceable in private desegregation litigation even if the District were never to receive another cent of federal aid. Such a remedy would go beyond the agreement into which the School District and HEW originally entered, which contemplated an exchange of one year's federal funds for one year's compliance with federal desegregation guidelines.[12]

The court of appeals erroneously refused to follow its own precedent in *United States* v. *Madison County Board of Education,* 326 F.2d 237 (5th Cir.), *cert. denied,* 379 U.S. 929 (1964), where it had rejected a similar overbroad construction of a school district's assurance to the United States Commissioner of Education. The *Madison County* case antedated the Civil Rights Act of 1964, and concerned laws providing federal financial assistance to schools serving areas affected by federal activities. The court refused to interpret an assurance by local public schools to comply "with the laws of the State" as a specifically en-

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[12] The Complaint did not allege that real or personal property purchased with federal funds was being utilized. Consequently, the durational provisions of the opening sentences of the second paragraph of the 1966 Assurance are inapplicable.

forceable undertaking to desegregate the schools. It held that the United States had only the statutory remedy of terminating the District's funds and could not desegregate the schools by injunction actions purportedly enforcing the assurances.[13]

Moreover, the 1966 Assurance in this case—which is the only one to which the District was legally bound—explicitly stated that new and amended requirements were to be effective "unless" the District advised HEW "that it does not intend to operate" its schools in accordance with such an amendment (p. —a, *infra*). After the Assurance was filed and for five years following, HEW indicated to the District that it was in compliance with federal standards for the receipt of federal funds. HEW thereafter modified its requirements for school desegregation plans to incorporate the principles it saw in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). HEW then asserted that the District failed to meet these new standards because some schools continued to be "substantially disproportionate in their racial composition." H.R. G. Ex. 7.

The District thereafter informed HEW that it disagreed with the agency's new desegregation standards and would not comply with them. This notice satisfied the condition subsequent which released the District from its promise to obey changed HEW requirements. Consequently, the District's refusal to accede to

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[13] *See also Bossier Parish School Board* v. *Lemon,* 370 F.2d 847, 851 (5th Cir.), *cert. denied,* 386 U.S. 1034 (1967), in which the Fifth Circuit (per Wisdom, J.) observed that a School District's Assurances would be a "frail reed" on which "to establish . . . [students'] right to a desegregated education."

HEW's demands did not violate its Assurance or entitle the United States to any relief on the contract. Dismissal of the action seeking specific performance was justified on this alternative ground.

The court of appeals' misconstruction of the Assurance in this case has sweeping ramifications. Since the same form of Assurance was signed by substantially all the Nation's school districts, the interpretation given to the document in this case applies to all situations in which the United States may seek to invoke this contract.[14] Suits for specific performance may readily be instituted on this basis as a means of circumventing Congress' restrictions on busing remedies. Whether such a procedure is permissible is a question of substantial public importance which this Court should resolve promptly.

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[14] We have learned that several other lawsuits based on the same novel legal theory have been filed by the United States and are awaiting the outcome of this case. The Department of Justice has rejected an informal inquiry for the citations of these cases, and we have, accordingly, filed an appropriate Freedom of Information Act request.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 1981

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Sept. 10, 1980.

No. 78-3510.

UNITED STATES OF AMERICA, *Plaintiff-Appellant,*

v.

MARION COUNTY SCHOOL DISTRICT et al.,
Defendants-Appellees.

Rehearing and Rehearing En Banc
Denied Oct. 23, 1980.

Appeal from the United States District Court for the Middle District of Florida

Before BROWN, AINSWORTH and FRANK M. JOHNSON, JR., Circuit Judges.

FRANK M. JOHNSON, JR., Circuit Judge:

This is an appeal by the United States from the dismissal of its complaint against the Marion County school district and school board, the members of the school board, and the school district superintendent.

When reviewing the sufficiency of a complaint against a motion to dismiss, the allegations of the complaint are to be taken as true. No citation of authority is necessary to sustain this basic proposition. Thus, from the allegations of the government's complaint, the defendants have followed and continue to follow a policy of racial discrimination against blacks in the assignment of students in the

Marion County public schools.[1] As further appears, the defendants, in exchange for the substantial amount of financial assistance the school district receives from the federal government each year, furnished assurances to the Department of Health, Education and Welfare (HEW) that in operating the school district they would comply with Title VI of the Civil Rights Act of 1964 and thus not discrimiante on the basis of race, color or national origin.[2] There is no question but that the discriminatory practices

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[1] According to the complaint, the present student assignment policies of the defendants with regard to certain elementary schools in the district result in racially identifiable vestiges of the district's former dual school system and perpetuate that dual school system in violation of the Fourteenth Amendment. *See generally Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971); *United States v. Board of Education*, 576 F.2d 37 (5th Cir.), *cert. denied*, 439 U.S. 1007, 99 S.Ct. 622, 58 L.Ed.2d 684 (1978).

[2] Title VI provides that:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 601, 42 U.S.C. § 2000d. The Title further provides that:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provision of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability. . . .

§ 602, 42 U.S.C. § 2000d-1.

In 1966 and in 1970 the defendants furnished HEW with assurances of compliance. There is no copy of the 1966 assurance in the record. The 1970 assurance, a copy of which was attached to the complaint, is appended to this opinion.

engaged in by the defendants, as the United States alleges in its complaint, constitute violations of these assurances.

The United States sought redress in the form of a court order compelling specific performance of the assurances by the defendants.[3] The district court held that the United States had no authority to maintain such a suit and for this reason dismissed the complaint.

We reverse. It is settled law that the United States has authority to fix the terms and conditions upon which its money allotments to state and other governmental entities should be disbursed. *Lau v. Nichols,* 414 U.S. 563, 569, 94 S.Ct. 786, 789, 39 L.Ed.2d 1 (1974); *King v. Smith,* 392 U.S. 309, 333, 88 S.Ct. 2128, 2141, 20 L.Ed.2d 1118 (1968); *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 295, 78 S.Ct. 1174, 1185, 2 L.Ed.2d 1313 (1958); *Oklahoma v. Civil Service Commission,* 330 U.S. 127, 143, 67 S.Ct. 544, 553, 91 L.Ed. 794 (1947). As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient of the grant is obligated to perform the conditions, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court. *E. g., Rex Trailer Co. v. United States,* 350 U.S. 148, 151, 76 S.Ct. 219, 221, 100 L.Ed. 149 (1956); *United States v. San Francisco,* 310 U.S. 16, 31, 60 S.Ct. 749, 757, 84 L.Ed. 1050 (1940); *Cotton v. United States,* 52 U.S. (11 How.) 229, 231, 13 L.Ed. 675

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[3] The first paragraph of the government's complaint identifies the suit as an action not only to compel specific performance of the contractual assurances, but also to enforce Title VI and the Fourteenth Amendment. The United States' response to the defendents' motion to dismiss indicates that the Title VI and Fourteenth Amendment claims were not intended to be asserted as independent causes of action, only as subsidiary to the contract claim. As noted above, the defendants' contractual assurances were to the effect that they would comply with Title VI. Title VI's standard is that of the Constitution. *See* note 20, *infra.*

(1850); *Dugan v. United States*, 16 U.S. (3 Wheat.) 172, 181, 4 L.Ed. 362 (1818).[4] Such suits are not new to the area of 'civil rights.' *See, e. g., United States v. Harrison County, Mississippi*, 399 F.2d 485 (5th Cir. 1968), *cert. denied*, 397 U.S. 918, 90 S.Ct. 925, 25 L.Ed.2d 99 (1970); *United States v. Sumter County School District*, 232 F. Supp. 945 (E.D.S.C. 1964); *United States v. County School Board*, 221 F.Supp. 93 (E.D. Va. 1963). *See also Halderman v. Pennhurst State School & Hospital*, 612 F.2d 84 (3d Cir. 1979) (en banc), *cert. granted limited to other issues*, —— U.S. ——, 100 S.Ct. 2984, 65 L.Ed.2d —— (1980); *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979); *United States v. Solomon*, 563 F.2d 1121 (4th Cir.

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[4] For example, as the Supreme Court stated in *McGee v. Mathis*, 71 U.S. (4 Wall.) 143, 18 L.Ed. 314 (1866):

> It is not doubted that the grant by the United States to the State upon conditions, and the acceptance of the grant by the State, constituted a contract. All the elements of a contract met in the transaction—competent parties, proper subject-matter, sufficient consideration, and consent of minds. This contract was binding upon the State. . . .

71 U.S. (4 Wall.) at 155, 18 L.Ed. 314.

The Supreme Court's decisions established, at least by 1850, that the United States is "a legal entity capable by force of the Constitution alone, so long as it [is] acting within its constitutional powers, of claiming in its contractual and proprietary relations the same protection of general law, at least, that belonged to any other legal person." P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and The Federal System 1302 (2d ed. 1973). The case of *Cotton v. United States, supra*, decided in 1850, "merely rounded out a picture already full sketched." *Id.* The Court in *Cotton* stated:

> It would present a strange anomaly, indeed, if, having the power to make contracts and hold property as other persons, natural or artificial, [public agencies] were not entitled to the same remedies for their protection.

52 U.S. (11 How.) at 231, 13 L.Ed. 675.

1977); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977).[5]

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[5] The *Harrison County* case stemmed from a federal grant to Harrison County, Mississippi, for the construction of a seawall and sand beach along the county's coastline to prevent hurricane damage. The grant was conditioned on the county's agreement that it would assure perpetual public use of the beach. When use of the beach was later discriminatorily denied to members of the public, the United States brought suit for specific performance of the agreement. This court granted the requested relief, holding that "the obligation of Harrison County as assumed in its contract with the United States is inescapable and must be enforced." 399 F.2d at 490. *See also* 414 F.2d 784 at 784-85 (5th Cir.) (on petition for rehearing and petition for rehearing en banc). The *County School Board* case involved a federal grant to the Prince George County, Virginia, school board for the construction of school facilities. In exchange for the grant, the school board furnished an assurance to the United States that the school facilities would be available to 'federally-connected' children (dependents of military and civilian personnel stationed at a local United States military base) on the same terms, in accordance with the laws of the state, as they are available to other children. Despite the fact that the relevant state statute excluded race as a criterion for student assignment, the school board assigned the federally-connected children using that criterion. The United States brought suit for an order compelling specific performance of the school board's assurance. The district court held that the United States had authority to so sue and granted the requested relief. *See* 221 F.Supp. at 103-05. *Accord United States v. Sumter County School District, supra*, 232 F.Supp. at 949-50.

The *Halderman*, *Mattson* and *Solomon* cases each involved suits against state officials for the relief of alleged violations of constitutional rights in the operation of state mental retardation facilities. The suits in *Mattson* and *Solomon* were filed by the United States, and the government alleged as authority for the suits only its interest in seeing to the enforcement of the laws and Constitution of the United States. *Cf.* U.S.Const. art. II, § 3 (President "shall take Care that the Laws be faithfully executed"). Although these allegations were found to be insufficient and the complaints

The basis of the district court's decision not to recognize the United States' right to sue on its contract in this case was the court's conclusion that Congress has deliberately

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dismissed, each court indicated that the United States might well have been entitled to seek its requested relief in a contract suit to enforce assurances the defendants had made to the United States in exchange for federal grants. *United States v. Mattson*, 600 F.2d at 1229 n.6; *United States v. Solomon*, 563 F.2d at 1125; *id.* at 1129 (Butzner, J., concurring). The *Halderman* case arose as a class action filed by a resident of a Pennsylvania state mental retardation facility. In holding that the district court acted correctly in allowing the United States to intervene as a plaintiff and seek injunctive relief, one of the issues on appeal, the court reasoned as follows:

> . . . [T]here is extensive federal legislation directed toward the well-being of the mentally retarded. . . . Large amounts of federal funds flow to Pennsylvania from the federal government, and the United States is vitally interested in the enforcement of the conditions on which those grants are made. One such condition is compliance with governing federal law. Had the United States sought to do so, it could have brought suit to enforce the conditions attached to its grants. Clearly, then, the district court did not abuse its discretion in permitting intervention under Rule 24.

612 F.2d at 92 (footnote omitted). *See also Drennon v. Philadelphia General Hospital, supra*, 428 F.Supp. at 817-18.

In opposition to this authority the defendants cite *United States v. Madison County Board of Education*, 326 F.2d 237 (5th Cir.), *cert. denied*, 379 U.S. 929, 85 S.Ct. 324, 13 L.Ed.2d 341 (1964). The citation is inapposite. Like *County School Board, supra*, and *Sumter County School District, supra, Madison* involved a number of suits filed by the United States for specific performance of certain contractual assurances made by local school boards to the United States in exchange for school construction funds. In *Madison*, the government's complaints were dismissed, not because the court found that the United States has no authority to sue to enforce contractual assurances of nondiscrimination, but rather because the court found it clear that the school boards had made

nullified the right where, as here, the contractual obligations the United States seeks to enforce are assurances of nondiscrimination in the operation of public schools.

This conclusion was mistaken. As noted, it is well established that the government's right to sue to enforce its contracts exists as a matter of federal common law, without necessity of a statute. *E. g., United States v. Tingey,* 30 U.S. (5 Pet.) 115, 127-28, 8 L.Ed. 66 (1831) (Story, J.) (calling the right "an incident to the general right of sovereignty"). *See United States v. Kearns,* 595 F.2d 729, 732 (D.C. Cir. 1978); Hart & Wechsler's *The Federal Courts and The Federal System* 1301-02 (2d ed. 1973) (citing cases). Congress may nullify the right, but, as the Supreme Court has repeatedly emphasized, courts are entitled to conclude that Congress has done so only if the evidence of Congress' intent is extremely, even unmistakably, clear. *See, e. g., United States v. United Mine Workers,* 330 U.S. 258, 272, 67 S.Ct. 677, 686, 91 L.Ed. 884 (1947) ("old and well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be

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no such assurances. *See* 326 F.2d at 239 ("No one would be so rash as to claim that a local school board in either of the 'hard core' States of Alabama or Mississippi would intentionally enter into a contract which it understood to provide for even partial desegregation of the races in the public schools under its jurisdiction. A more improbable official action of such a local school board can scarcely be imagined.") In contrast to the assurances in *Madison,* which provided only that the school boards assign students in accordance with state law, the assurances here specifically provided that the defendants would not discriminate on the basis of race. *See* Appendix. The assurances here also specifically provided that "[t]he Applicant recognizes and agrees . . . that the United States shall have the right to seek judicial enforcement of this assurance." *Id.*

applied to the sovereign without express words to that effect").[6]

Contrary to the determination of the district court, and to the arguments of the defendants on appeal, there is no persuasive, much less unmistakable, evidence that Congress intended to eradicate or even restrict the United States' right to sue to enforce contractual assurances of nondiscrimination in the operation of public schools.

It is true, as the district court found, that the Civil Rights Act of 1964—the legislative expression on which the defendants and the district court place principal reliance—expressly establishes a number of alternative means by which the government may act to eliminate discrimi-

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[6] *See also Hancock v. Train*, 426 U.S. 167, 179, 96 S.Ct. 2006, 2012, 48 L.Ed.2d 555 (1976); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 120, 80 S.Ct. 543, 555, 4 L.Ed. 2d 584 (1960); *United States v. Wittek*, 337 U.S. 346, 358-59, 69 S.Ct. 1108, 1114-15, 93 L.Ed. 1406 (1949); *United States v. Wyoming*, 331 U.S. 440, 449, 67 S.Ct. 1319, 1324, 91 L.Ed. 1590 (1947); *United States v. Stevenson*, 215 U.S. 190, 197, 30 S.Ct. 35, 36, 54 L.Ed. 153 (1909); *United States v. Herron*, 87 U.S. (20 Wall.) 251, 263, 22 L.Ed. 275 (1874). The Court stated, for example, in *Dollar Savings Bank v. United States*, 86 U.S. (19 Wall.) 227, 22 L.Ed. 80 (1874):

> . . . The prohibitions, if any, either express or implied, contained in the [Internal Revenue Law] of 1866, are for others, not for the Government. . . . It is a familiar principle that the king is not bound by any Act of Parliament unless he be named therein by special and particular words. The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him in the least, if they may tend to restrain or diminish any of his rights and interests . . . The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal Courts.

86 U.S. (19 Wall.) at 239, 22 L.Ed. 80 (citations omitted).

nation in the operation of federally-funded public schools. These include, as the district court noted, (1) informal administrative efforts to achieve voluntary compliance with Title VI's prohibition of discrimination in the operation of programs receiving federal assistance,[7] (2) formal administrative fund termination proceedings under Title VI,[8] (3) suits by the Attorney General under Title IV in response to private complaints,[9] and (4) intervention by the Attorney General under Title IX in pending private suits.[10] However, as noted above, it would be error for a court to *presume*, as apparently did the district court, that these other means were intended to be exclusive.[11] It would also be error for a court to conclude from a study of the

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[7] The Title's discrimination prohibition is set out in note 2, *supra*. The Title's provisions regarding administrative efforts to achieve voluntary compliance are set forth in § 602 of the Act, 42 U.S.C. § 2000d-1. *See also* 45 C.F.R. § 80.7(d).

[8] § 602, 42 U.S.C. § 2000d-1. *See* 45 C.F.R. §§ 80.8(a) & (c), 80.9-80.11, 81.1 *et seq.*

[9] § 407, 42 U.S.C. § 2000c-6. *See, e.g., United States v. Greenwood Municipal Separate School District*, 406 F.2d 1086 (5th Cir.), *cert. denied*, 395 U.S. 907, 89 S.Ct. 1749, 23 L.Ed.2d 220 (1969). Title IV of the Act is devoted to "Public Education."

[10] § 902, 42 U.S.C. § 2000h-2. *See, e.g., Wade v. Mississippi Cooperative Extension Service*, 528 F.2d 508 (5th Cir. 1976). Title IX of the Act is devoted to "Intervention and Procedure After Removal in Civil Rights Cases."

[11] For example, as the Supreme Court stated in *United States v. Stevenson*, cited above in note 6:

> The rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such a prohibition is intended to reach the government in the use of known rights and remedies, the language must be clear and specific to that effect.

215 U.S. at 197, 30 S.Ct. at 36.

Act and its legislative history that such an intent should be inferred. The Civil Rights Act nowhere states that the above-enumerated remedies are to be the exclusive means for eliminating discrimination in the operation of public schools. To the contrary, the statute clearly provides that other means of action, even if not mentioned in the Act, are to be preserved. Title VI of the Act, the particular title with which the defendants assured HEW they would comply and which assurances the United States seeks to enforce here, *see* notes 2 & 3, *supra*, states that compliance with the Title may be effected "(1) by the termination of or refusal to grant or continue assistance . . ., or (2) by any other means authorized by law . . .." § 602, 42 U.S.C. § 2000d-1. Title XI, containing the Act's "miscellaneous provisions," states even more clearly that: "Nothing in this act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing laws to institute or intervene in any action or proceeding." § 1103, 42 U.S.C. § 2000h-3. This stated intent to preserve other means of action which were not expressly set out in the Act is not contradicted by the Act's legislative history; it is corroborated. Indeed, the record of the floor debates prior to the Act's passage indicates that it was Congress' specific understanding that the "any other means authorized by law" language in Title VI quoted above included government suits to enforce contractual assurances of the kind filed by the United States here.[13] HEW issued regulations so interpreting the Act shortly

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[13] Senator Pastore was one of the principal spokesmen for Title VI among the Senate sponsors of the Act. In response to an inquiry as to the meaning of the phrase "any other means authorized by law," he made clear, without contradiction, that:

> Again, if an agency's nondiscrimination requirement is embodied in a contractual commitment, the agency may be able to bring suit to enforce its contract.

after its passage. 29 Fed.Reg. 16, 301 (1964), *codified at* 45 C.F.R. § 80.8(a).[13] For these reasons, we conclude that,

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110 Cong.Rec. 7060 (1964). *See also id.* at 7066 (remarks of Sen. Ribicoff) (calling such a suit "the most effective way for an agency to proceed").

The defendants' arguments to the contrary are, at best, unconvincing. They find support for their conclusion that Congress intended to prohibit the United States from bringing suits to enforce Title VI contractual assurances (1) in the House Judiciary Committee's rejection of an original subcommittee draft of the Title that provided for enforcement through administrative fund termination proceedings, *civil actions to enforce regulations or agreements entered under the Title,* and any other means authorized by law; (2) in the rejection by the full House of an amendment to the Title that would have eliminated all administrative means for enforcement in favor of exclusive reliance on contract suits, and (3) in statements by some of the Title's sponsors that one of the alternatives to administrative termination of funds was government litigation under Title IV. As for (1), the reported rewording of the Title by the House Judiciary Committee hardly compels the defendants' inference that the committee and Congress intended to prohibit government suits to enforce Title VI contractual assurances. Although the purpose of the revision is unclear, it seems highly unlikely that it would have been meant to have such an effect. It also seems unlikely that it would have been understood by Congress to have such an effect. As for (2) and (3), as explained above, the fact that Congress intended to authorize a number of means of obtaining compliance with Title VI other than contract enforcement actions cannot be said to indicate that Congress intended to prohibit such actions as a means of obtaining compliance. This is especially so given the permissive language of the Act. *Compare, e. g.,* Age Discrimination Act of 1975, § 305, 42 U.S.C. §6104(e) ("provisions of this section shall be the *exclusive* remedy for the enforcement of the provisions of this chapter") (emphasis added) [amended 1978].

[13] 45 C.F.R. § 80.8(a) provides:

§ 80.8 *Procedure for effecting compliance.*

(a) *General.* If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompli-

contrary to the defendants' contentions, the remedies for school discrimination expressly authorized by Congress in the Civil Rights Act of 1964 were not intended to be exclusive or to restrict the United States' right to sue to enforce contractual assurances of one compliance with Title VI.[14]

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ance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

See also 28 C.F.R. § 50.3 (Department of Justice guidelines for the enforcement of Title VI) (promulgated 1966); "Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances. . . ." *See generally* Comment, The Courts, HEW and Southern School Desegregation, 77 Yale L.J. 321, 330-31 (1967).

As a contemporaneous construction of a statute by an agency charged with its execution, regulations such as those issued by HEW here are traditionally considered strong evidence of Congress' understanding. *See, e. g., United States v. Sheffield Board of Commissioners,* 435 U.S. 110, 131, 98 S.Ct. 965, 979, 55 L.Ed.2d 148 (1978); *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 381, 89 S.Ct. 1794, 1802, 23 L.Ed. 2d 371 (1969). On this point, see also *Lee v. Macon County Board of Education,* 270 F.Supp. 859, 862 (M.D. Ala. 1967).

[14] Apparently no court other than the district court here has held that the Civil Rights Act prohibits government suits to enforce Title VI contractual assurances. A number of courts have, to the contrary, held or indicated that such suits are proper. In this regard, see, for example, *United States v. Tatum Independent School District,* 306 F.Supp. 285, 288 (E.D. Tex. 1969) and *United*

The defendants rely in the alternative on the Eagleton-Biden Amendment to HEW's 1978 appropriations act. The amendment essentially prevents HEW from requiring "the transportation of any student to a school other than the school nearest the student's home."[15] According to the

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States v. Frazer, 297 F.Supp. 319 (M.D. Ala. 1968). *Accord Brown v. Califano*, 627 F.2d 1221 at 1232, n.67 (D.C. Cir., decided Jan. 31, 1980).

In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), the Supreme Court recognized the existence of a private right of action under Title VI even though the Act nowhere made express provision for such a right. 441 U.S. at 703, 99 S.Ct. at 1961. In *Lau v. Nichols*, 414 U.S. 563, 94 S.Ct. 786, 39 L.Ed.2d 1 (1974), a case relied on by the *Cannon* Court for support, the Supreme Court had assumed the existence of a private right of action under Title VI and entertained a suit by students in the San Francisco school system seeking to enforce contractual assurances made by school system officials to HEW that they would comply with Title VI. 414 U.S. at 568-69. In *Cannon*, Justice White, joined by Justice Blackmun, dissented from the Court's conclusion that private parties enjoy an implied right of action under Title VI, but he noted that:

> To be sure, Congress contemplated that there would be litigation brought to enforce Title VI. The "other means" provisions of § 602 includes agency suits to enforce contractual antidiscrimination provisions . . .

441 U.S. at 722 & n.9, 99 S.Ct. at 1970.

See generally Wyandotte Transportation Co. v. United States, 389 U.S. 191, 204, 88 S.Ct. 379, 387, 19 L.Ed.2d 407 (1967) ("We do not believe that Congress intended to withhold from the Government a remedy that ensures the full effectiveness of the Act.").

[15] The full text of the amendment is as follows:

> None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, in order to comply with Title VI of the Civil Rights

defendants, the amendment also nullifies the Attorney General's right to sue to enforce contractual assurances of nondiscrimination in the operation of public schools where, as here, the relief sought involves the transportation of students to schools other than those nearest their homes.[16]

A review of the amendment and its legislative history suggests no such interpretation. Nothing in the language of the amendment precludes the United States from seeking transportation relief in a federal court suit to enforce contractual assurances of nondiscriminatory school operation. Nor is any such limitation indicated by the amendment's legislative history. What the legislative history establishes is simply that Congress intended to prevent the HEW bureaucracy from acting solely on its own au-

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Act of 1964. For the purposes of this section an indirect requirement of transportation of students includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing or clustering. The prohibition described in this section does not include the establishment of magnet schools.

§ 208(b), Pub.L.No. 95-205, *codified at* 42 U.S.C. § 2000d.

[16] HEW referred the Marion County school district case to the Department of Justice after determining that: "A complete remedy of the District's violation of the Fourteenth Amendment and of Title VI cannot be provided without transportation of some students to a school other than the one closest to their homes." Letter from David Tatel, Director, HEW Office for Civil Rights, to Drew S. Days, Ass't Attorney General, Civil Rights Division, Department of Justice at 2, *attached to* Complaint. The government has maintained on appeal that "effective desegregation . . . will undoubtedly require the use of one or more of the restricted desegregation remedies."

thority in *administrative* proceedings to coerce local school districts into adopting busing plans.[17] Congress fully intended that the federal courts would retain their authority to mandate busing, and that they would be able to do so in response to suits such as this one brought by the United States, on referral from HEW, to enforce a school dis-

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[17] There are no committee or conference reports describing the intended operation of the amendment. The floor statements of the amendment's sponsors are, however, sufficiently clear. Both Senator Eagleton and Senator Biden left no question but that the amendment prohibits only administratively-imposed busing. Senator Eagleton explained that:

> All we are talking about is a unilateral in-house, bureaucratic HEW administrative order which orders busing, because they force them to. If they do not bus, they take away all of their Federal funds, impact aid, title I, just name it. "We take it away."

123 Cong.Rec. 21262 (1977). *See id.* at 21242-43; 21246. Senator Biden emphasized that:

> We are only talking here about administrative busing. We are not talking about court-ordered busing. . . .
>
> Look, let us try to get three things straight here. No. 1, those of you who are going to vote [against the amendment] are making one decision: That you think, absent a court order, a bureaucrat downtown or out in the district can make a judgment that there is a constitutional violation that exists. I say to you that the only person who should be able to make that decision is a duly constituted Federal court. It is not for some bureaucrat to say, "We think you violated the Constitution; therefore, we make the judgment that unless you comply with our order, you do not get any Federal money."

Id. at 21252. *See also id.* at 21258 (remarks of Sen. Roth) ("The purpose of this amendment is to keep the bureaucrats out of busing.").

trict's Title VI contractual assurances of nondiscrimination.[18]

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[18] For example, in the course of the floor debate, Senator Eagleton stated that under the amendment,

> when HEW determines that compliance with Title VI requires that students be bused, because of the grave consequences to a community that very often accompany such a requirement, enforcement may not proceed through the administrative process. HEW is authorized under Title VI to refer matters to the Department of Justice for litigation; this is the course that should be pursued if there is a decision to go forward in a case to which the [Eagleton-Biden] amendment applies.

123 Cong.Rec. 21246 (1977). *See also id.* at 21242-43; 21252; 21258; 21262.

The Eagleton-Biden Amendment aside, the defendants contend that the government's suit, because it seeks transportation relief, is likewise barred by the Equal Educational Opportunities Act of 1974. This contention, like the defendants' Eagleton-Biden argument, ignores the clear intent of Congress. The Equal Educational Opportunities Act does provide that:

> No court, department, or agency of the United States shall, pursuant to section 1713 of this title [listing priority of remedies for "a denial of equal educational opportunity or a denial of the equal protection of the laws"], order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

§ 215(a), 20 U.S.C. § 1714(a). However, the act also provides that:

> the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

§ 203(b), 20 U.S.C. § 1702(b). As Congress and the courts have understood, the United States, in asking courts to compel defendants to perform contractual assurances of compliance with Title VI, is simply asking courts to enforce the requirements of the Fifth and Fourteenth Amendments. Title VI's standard is that of the Constitution. *See* note 20, *infra*.

The contrary interpretation of the amendment suggested by the defendants would call into question not the authority of the United States to bring this suit, but rather the constitutionality of the Eagleton-Biden Amendment itself.[19] The United States, in seeking to enforce the defendants' contractual assurances of compliance with Title VI, is simply seeking to enforce the Constitution.[20] It is well

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It may be noted that, like the Eagleton-Biden Amendment, the Equal Educational Opportunities Act's 'anti-busing' provision, otherwise known as the Esch Amendment, does serve as a constraint on extrajudicial administrative agency action. However, the Esch Amendment has been effectively superseded by the less generous Eagleton-Biden Amendment. *Compare* 20 U.S.C. § 1714 (a) (Esch Amendment) (permits transportation to "closest or next closest school") *with* 42 U.S.C. § 2000d (Eagleton-Biden Amendment) (with certain exceptions, permits transportation only to "school which is nearest the student's home").

[19] *Cf. United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 571, 93 S.Ct. 2880, 2893, 37 L.Ed.2d 796 (1973) (task of Court is "not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations"); *Lynch v. Overholser*, 369 U.S. 705, 711, 82 S.Ct. 1063, 1067, 8 L.Ed.2d 211 (1962).

[20] There is no question but that Congress understood that Title VI's standard is that of the Constitution. For example, Senator Humphrey stated during the congressional debates:

> As I have said, the bill has a simple purpose. That purpose is to give fellow citizens—Negroes—the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what the Constitution guarantees.

110 Cong.Rec. 6553 (1964). *See also id.* at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606-7 (remarks of Sen. Javits); 5253, 5863-64, 13442 (remarks of Sen. Humphrey). *Accord University of California Regents v. Bakke*, 438 U.S. 265, 284-87, 2745-47, 57 L.Ed.2d 750 (1978) (opinion of Powell, J.);

established that the United States is constitutionally prohibited from providing financial assistance to school districts engaged in discrimination violative of the Constitution. *See, e. g., Norwood v. Harrison,* 413 U.S. 455, 467, 93 S.Ct. 2804, 2811, 37 L.Ed.2d 723 (1973); *Cooper v. Aaron,* 358 U.S. 1, 19, 78 S.Ct. 1401, 1410, 3 L.Ed.2d 5 (1958); *Bolling v. Sharpe,* 347 U.S. 497, 499-500, 74 S.Ct. 693, 694-95, 98 L.Ed. 884 (1954).[21] By leaving the United States with no means to challenge the discriminatory practices of the defendants, as alleged here, and no choice other than to continue funding those practices, the district court decision would force the United States to so violate the Constitution.[22] The facial constitutionality of the Eagleton-

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id. at 328-55, 98 S.Ct. at 2768-2782 (opinion of Brennan, White, Marshall & Blackmun, JJ.); *United States v. Jefferson County Board of Education,* 372 F.2d 836, 848 (5th Cir. 1966), *aff'd en banc,* 380 F.2d 385, *cert. denied,* 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967); *Lee v. Macon County Board of Education,* 270 F.Supp. 859, 865 (M.D. Ala. 1967).

[21] As the Northern District of Illinois explained in *United States v. Chicago,* 395 F.Supp. 329 (N.D.Ill.), *aff'd mem.,* 525 F.2d 695 (7th Cir. 1975):

> Where recipients of federal funds have engaged in unlawful discrimination, courts have been quick to require that federal agencies refrain from participating in the discriminatory practices, and exercise affirmative duties to police compliance and prevent constitutionally and statutorily proscribed discrimination.

395 F.Supp. at 342-43 (citing cases).

[22] According to the district court, when the United States seeks to eliminate discrimination in the operation of federally funded schools, in cases such as this one in which it considers it necessary to transport students to schools other than those nearest their homes, the United States' options are limited to (1) informal administrative efforts to achieve compliance with Title VI, (2) Title IV lawsuits in response to private complaints, and (3) Title IX interventions in pending private suits. *See* notes 7, 9 & 10, *supra.*

Biden Amendment was recently challenged on this general theory, viz., that the amendment impermissibly burdens the government's constitutional obligation to assure that schools receiving federal support do not discriminate. *See Brown v. Califano,* 455 F.Supp. 837, 842-43 (D.D.C. 1978). The United States Court of Appeals for the District of Columbia Circuit affirmed the district court decision rejecting the challenge, holding that even though the amendment curtails HEW's ability to terminate funding to discriminatory school programs, it leaves intact a number of other means by which the government may be able to effectively ensure that the discriminatory practices in those programs are enjoined. *Brown v. Califano,* 627 F.2d 1221, (D.C. Cir. 1980). As the District of Columbia Circuit correctly held, one such means is a suit by the United States to enforce contractual nondiscrimination assurances such as the suit filed by the United States here. At 1232 & n.67.[23]

Here the government has alleged (1) that, as the parties have stipulated, all necessary efforts at achieving voluntary compliance have failed and that negotiations are at an impasse, (2) that it lacks the written complaint from a parent of an affected student necessary to a government action under Title IV, and (3) that there is no pending private action in which it may intervene under Title IX.

[23] In addition to contract enforcement actions, the *Brown* court also identified two of the potential means noted by the district court (encouragement of voluntary compliance, and suits under Title IV in response to private complaints), neither of which is available here, *see* note 22, *supra,* and two remedies created by Congress in the Equal Educational Opportunities Act of 1974. *See* 20 U.S.C. § 1709 (Attorney General may intervene in suits brought by individuals denied "equal educational opportunities" as defined in the Act); 20 U.S.C. § 1706 (Attorney General may institute civil actions on behalf of individuals denied "equal educational opportunities" as defined in the Act).

It is uncertain whether the Equal Educational Opportunities Act remedies are available to the United States in cases such as

The United States' contract rights aside, it has also been suggested that the United States is entitled to seek the relief requested here (1) because it enjoys an implied right of action under Title VI. *See, e. g., Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 204, 88 S.Ct. 379, 387, 19 L.Ed.2d 407 (1967) (implying a right of action to the United States under the Rivers and Harbors Act of 1899),[24] and (2) because it has inherent authority to sue to enforce the Fourteenth Amendment, *see, e. g., United States v. City of Jackson,* 318 F.2d 1, 14 (5th Cir. 1963) *and* Judge Brown's dissenting opinion in *United States v. Mississippi,* 229 F.Supp. 925, 975-76 (S.D. Miss. 1964). [The majority position from which Judge Brown dissented was later reversed on appeal by the Supreme Court. *See United States v. Mississippi,* 380 U.S. 128, 85 S.Ct. 808, 13 L.Ed.2d 717 (1965).] [25] Because of our understanding of

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this one. The *Brown* court did not discuss the interpretative questions these remedies have engendered. According to the government, "[t]he Attorney General under 20 U.S.C. 1706 may bring suit on behalf of an individual denied an 'equal educational opportunity,' but the relief available, particularly as relates to transportation of students, may be somewhat limited." *See, e. g., United States v. School District,* 577 F.2d 1339, 1343-46 (6th Cir. 1978) (actions by Attorney General under Equal Educational Opportunities Act may not include Fourteenth Amendment claims). *See also United States v. Hinds County School Board,* 560 F.2d 619, 623-24 (5th Cir. 1977).

[24] *See generally* Note on the Implication of Rights of Action by the United States, Hart & Wechsler's The Federal Courts and The Federal System 1301-09 (2d ed. 1973); Note, Nonstatutory Executive Authority to Bring Suit, 85 Harv.L.Rev. 1566, 1567-68 (1972) (citing cases in which Supreme Court has upheld "right of the Attorney General to institute actions in the name of the United States in order to effectuate a congressionally established scheme").

[25] *Cf. Sanitary District of Chicago v. United States,* 266 U.S. 405, 425, 45 S.Ct. 176, 178, 69 L.Ed. 352 (1925) (United States

the enforceability of the United States' contract rights, we find it unnecessary to pass on the question of the capacity of the United States to sue on these alternative grounds. *See, e. g., United States v. City of Jackson,* 320 F.2d 870, 872-73 (5th Cir. 1963) (on petition for rehearing) (Ainsworth, J., concurring).

The defendants' additional arguments notwithstanding,[28] we conclude that the United States is entitled to sue to

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entitled to sue to remove obstruction to interstate commerce); *United States v. U.S. Klans,* 194 F.Supp. 897, 902 (M.D.Ala. 1961) (same). *See generally New York Times Co. v. United States,* 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *In re Debs,* 158 U.S. 564, 15 S.Ct. 900, 39 L.Ed. 1092 (1895). In *Debs,* the Supreme Court stated that:

> Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other.

158 U.S. at 584, 15 S.Ct. at 906. *See* Notes cited in note 24, *supra;* Note, Protecting the Public Interest: Nonstatutory Suits by the United States, 89 Yale L.J. 118 (1979).

[28] In support of their position the defendants advance a number of additional arguments based on the wording or changes in wording of the National Health Planning and Resources Development Act of 1974 and the Revenue Sharing Act of 1972. For example, the Revenue Sharing Act originally provided that, when the Secretary of the Treasury was unable to achieve voluntary compliance with the Act's antidiscrimination provisions, the Secretary was authorized:

> (1) to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; (2) to exercise the powers and functions provided by Title VI of the Civil Rights Act of 1964; or (3) to take such other action as may be provided by law.

31 U.S.C. § 1242(b) (1972). According to the defendants, "this was an unmistakable indication of congressional understanding"

enforce contractual assurances of compliance with Title VI's prohibition against discrimination in the operation of federally-funded schools, and that the United States is entitled to whatever relief is necessary to enforce such assurances, including "transportation relief." The decision of the district court to dismiss the United States' complaint was error. The case is

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

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that Title VI was not to be enforced by government suits to enforce contractual assurances or by other government civil actions. We cannot agree. These additional arguments of the defendants have no merit.

APPENDIX

Assurance of Compliance with the Department of Health, Education, and Welfare Regulation Under Title VI of the Civil Rights Act of 1964

Marion County District #42 (Fla.) School System
(Name of Applicant)

(hereinafter called the "Applicant")

Hereby Agrees That it will comply with title VI of the Civil Rights Act of 1964 (P.L. 88-352) and all requirements imposed by or pursuant to the Regulation of the Department of Health, Education, and Welfare (45 CFR Part 80) issued pursuant to that title, to the end that, in accordance with title VI of that Act and the Regulation, no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant receives Federal financial assistance from the Department; and Hereby Gives Assurance That it will immediately take any measures necessary to effectuate this agreement.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant by the Department, this assurance shall obligate the Applicant, or in the case or any transfer of such property, any transferee, for the period during which the real property or structure is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases, this assurance shall obligate the Applicant for the period during which the Federal financial assistance is extended to it by the Department.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance extended after the date hereof to the Applicant by the Department, including installment payments after such date on account of applications for Federal financial assistance which were approved before such date. The Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant.

Dated October 14, 1970

P.O. Box 670
Ocala, Florida 32670
(Applicant's mailing address)

Marion County District
#42 (Fla.) School System
(Applicant)

By /s/ JOHN F. LANE
(President, Chairman of Board, or
comparable authorized official)
JOHN F. LANE, Chairman
Marion County District School Board

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

No. 78-22-Civ-Oc

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARION COUNTY SCHOOL DISTRICT, et al., *Defendants*.

OPINION

Until 1965, the school district of Marion County, Florida, was a dual, segregated school system. Beginning in 1965, the school district devised, and began implementing, a plan to segregate the school system. The parties agree that over the past thirteen years, the desegregation plan has resulted in substantially integrating the formerly dual school system into a unitary system. Two elementary schools, however, Madison Street and Howard, were formerly all black schools, and remain with a 97% black student population. The United States brings this action seeking injunctive relief to require "a desegregation plan for the Madison Street . . . and Howard . . . [elementary schools] which will fully disestablish the dual system of schools based on race."

There is a presumption against the school board. Where there has been a dual, segregated school system in the past, and schools which were formerly one race only remain predominantly one race, the presumption is that they are lingering vestiges of the dual system, which must be removed. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 420 U.S. 1, 26, 28 L.Ed.2d 554, 572 (1971); *United States v. Board of Educ. of Valdosta, Ga.*, —— F.2d ——, ——, Case No. 76-3024 (5th Cir. 1978). That presumption is rebuttable, but the school board carries the heavy burden to

show that the two elementary schools are not the continuing, vestigial effects of the former segregated, dual system. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 26, 28 L.Ed.2d at 572; *United States v. Board of Educ. of Valdosta, Ga.*, —— at ——; *United States v. DeSoto Parish School Bd.*, 574 F.2d 804, 812 (5th Cir. 1978); *United States v. Gadsden County School Dist.*, 572 F.2d 1049, 1050 (5th Cir. 1978). The existence of these two formerly segregated elementary schools, as predominantly one-race schools, necessitates the Court's close and careful scrutiny. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 26, 28 L.Ed2d at 572; *United States v. South Park Indep. School Dist.*, 566 F.2d 1221, 1234-25 (5th Cir. 1978). If the school board cannot survive that scrutiny and carry its heavy evidentiary burden, the Court's duty under federal law is unmistakable: the vestiges of officially enforced racial discrimination, under a segregated, dual, educational system, must be eradicated. *Milliken v. Bradley*, 433 U.S. 267, 290, 53 L.Ed.2d 745, 762 (1977); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. at 15, 28 L.Ed.2d at 566; *United States v. DeSoto Parish School Bd.*, 574 F.2d at 811; *Davis v. East Baton Rouge Parish School Bd.*, 570 F.2d 1260, 1263 (5th Cir. 1978). In that event, the Court will not hesitate to act in performing its duty.

As this case presently stands, however, the Court is unable to reach the merits and make a determination about the character of the two, virtually all black, elementary schools in the Marion County school system. The issue raised by the school board's motion to dismiss is whether the United States has authority to sue for injunctive relief, and in turn whether this Court has any jurisdiction to grant such relief, solely under Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d *et seq.* More precisely phrased, the question presented is whether the language "by any other means authorized by law: in 42 U.S.C. § 2000d-1 of Title VI authorizes the United States to sue for, and confers jurisdiction upon this Court to grant, in-

junctive relief requiring desegregation of two elementary schools, by means of a lawsuit based solely upon the enforcement of contractual assurances, required as a condition for receiving federal financial assistance by regulations implementing Title VI, that the school board will honor Title VI's ban on racial discrimination. The government asserts that the language "by any other means authorized by law" in Title VI, together with specific executive branch regulations, contemplate and authorize the government seeking, and the Court issuing, injunctive desegregation solely by a lawsuit to enforce the school board's promise to obey Title VI's prohibition against discrimination. The school board, on the other hand, argues that (1) in addition to the express administrative remedy of terminating federal financial aid if Title VI's anti-discrimination requirement is not honored, the language "by any other means authorized by law" authorizes (2) various other administrative efforts and methods to obtain compliance where available under existing statutes and regulations, and (3) government litigation premised upon independent statutory authority, such as Title IV (42 U.S.C. § 2000c-6), Title IX (42 U.S.C. § 2000h-2), or the Equal Educational Opportunities Act (20 U.S.C. §§ 1706, 1708-14, 1718).

There is no question that, if the Department of Health, Education & Welfare ('HEW') has the authority originally under Title VI to bring actions based on it alone, in order to obtain injunctive desegregation by means of enforcing federal funding recipients' assurances of nondiscrimination under Title VI, then the United States Attorney General and the Department of Justice have standing to assert that original right of action on behalf of HEW. *Cf. United States v. Soloman,* 563 F.2d 1121, 1124 (4th Cir. 1977). *See* 28 U.S.C. §§ 516-19. The regulations which purport to authorize (1) referral of violations of Title VI's non-discrimination mandate to the Department of Justice, and (2) government litigation based solely on the intention and alleged

right to enforce funding recipients' nondiscrimination assurances, 45 C.F.R. § 80.8(a)-(d); 28 C.F.R. § 50.3(a)-(c), would constitute something tantamount to an assignment by HEW or its original right to sue under Title VI to the

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[1] 45 C.F.R. § 80.1 et seq. are the HEW regulations which implement Title VI (42 U.S.C. § 2000d et seq.). 45 C.F.R. § 80.4 specifically provides:

> Every application for Federal financial assistance to carry out a program to which this part applies, . . . and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part. . . .
>
> (c) *Elementary and secondary schools.* The requirements of paragraph (a) or (b) of this section [i.e., assurances that the program of facility will comply with the requirements imposed in these regulations] with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible Department official determines is adequate to accomplish the purposes of the Act and this part, at the earliest practicable time and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the responsible Department official may reserve the right to redetermine after such period as may be specified by him, the adequacy of the plan to accomplish the purposes of the Act and the regulations. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such a plan shall be revised to conform to such final order, including any future modification of such order. . . .

Department of Justice. The insuperable obstacle, however, is that HEW does not have that right to begin with.

The government asserts 28 U.S.C. § 1345 as its source of authority, and of the Court's jurisdiction, for this case. Section 1345 empowers the district courts to decide originally "all civil actions, suits or proceedings commenced by the United States," or its agencies or officers, only if "expressly authorized to sue by Act of Congress." The requirement of express authorization by Congress, and of a correspondingly specific grant of jurisdiction to the courts, is consistent with the fundamental principles (1) that federal courts are courts of strictly limited jurisdiction; and (2) that the presumption is against jurisdiction with the burden on the party seeking to invoke federal jurisdiction to prove to the Court that jurisdiction exists. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle,* 429 U.S. 274, 278, 50 L.Ed.2d 471, 478 (1977); *McNutt v. GMAC,* 298 U.S. 178, 182-83, 80 L.Ed. 1135, 1137-38 (1935); *Louisville & N. R. Co. v. Mottley,* 211 U.S. 149, 152, 53 L.Ed. 126, 127 (1908); *Cameron v. Hodges,* 127 U.S. 322, 326, 32 L.Ed. 132, 134 (1888); *Mansfield, C. & L. M. Ry. v. Swan,* 111 U.S. 379, 382, 28 L.Ed. 462, 463 (1884); *Turner v. President, Directors & Co. of Bank of N. Amer.,* 4 Dall. 7, 8, 1 L.Ed. 718 (1799); *Bingham v. Cabot,* 3 Dall, 382, 1 L.Ed. 646 (1798); *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.,* 469 F.2d 416, 418 (5th Cir. 1972); *Birmingham Post Co. v. Brown,* 217 F.2d 127, 130 (5th Cir. 1954); *Marshall v. Reinhold Constr., Inc.,* 411 F.Supp. 685, 688-89 (M.D.Fla. 1977); *Morrison v. Morrison,* 408 F.Supp. 315, 316 (N.D.Tex. 1976).

Congress has not, however, by the language "by any other means authorized by law" (42 U.S.C. § 2000d-1) authorized HEW to seek compliance with the Constitution and with Title VI's nondiscrimination mandate, including desegregational injunctive relief, by means of lawsuits solely and directly based on the enforcement of federal funding recipients' promises, assurances, and agreements

required under Title VI and implementing HEW regulations. Correspondingly, Congress has not granted jurisdiction to federal courts to order in junctive relief in government actions brought under Title VI alone, to achieve school desegregation by means of enforcing funding agreements and nondiscrimination assurances under Title VI between HEW and a school district.

I. Legislative History of Title VI

The Court is keenly mindful of the Supreme Court's admonition to be wary about interpreting statutes from the tumultous legislative history of congressional floor debates. *S. & E. Contractors, Inc. v. United States,* 406 U.S. 1, 13 n. 9, 31 L.Ed.2d 658, 668 n. 9 (1972). Specifically, the Supreme Court cautioned that except for precise analyses of statutory phrases by sponsors of proposed laws, one should be "extremely wary of testimony before committee hearings and of debates on the floor of Congress."[2] *Id.* Nevertheless, in the present case, the Court has the benefit of not only conduct and statements during floor debates in Congress over the 1964 Civil Rights Act, but also specific statements from sponsors of the law in the Senate, concerning the phrase "by any other means authorized by law," as well as indications in the reports accompanying the law.

First, after an objection to the language of Title VI as "ineptly drawn,"[3] the House of Representatives was pre-

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[2] The Supreme Court stated its reason in a maxim formulated by Mr. Justice Holmes, to inquire not "what the legislature meant," but only "what the statute means." *S & E Contractors, Inc.* v. *United States,* 406 U.S. at 13 n. 9, 31 L.Ed.2d at 668 n. 9. In most cases, however, it is not possible to separate analytically the meaning of a statute from what Congress intended it to mean.

[3] Remarks of Rep. Flynt of Georgia, 110 Cong.Rec. 2479: ". . . the language of Title VI is ineptly drawn. The proponents . . . disagree on what it means."

sented with, and rejected, an amendment that would have effectuated "the same purposes as Title VI," but by using "the law of contracts in doing so."[4] The amendment, offered by Representative Meader, (1) would have substituted the remedies of contract-law litigation, based upon the assurances and agreements between funding recipients and HEW, in place of the informal administrative procedures contemplated under Title VI (42 U.S.C. § 2000d-1); (2) would have expressly conferred jurisdiction upon the district courts to hear and grant relief for such actions; but (3) would have still forbidden injunctive relief as an available remedy for such contract-based actions.[5]

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[4] Remarks of Rep. Meader of Michigan, in proposing his amendment on the floor of the House. 110 Cong.Rec. 2480 (Feb. 7, 1964).

[5] 110 Cong.Rec. 2492-95 (Feb. 7, 1964).

> There are two primary differences between the committee's title VI approach and my own. First, there would be greater flexibility in the approach that I would take, by using the law of contracts as a means of spelling out the recipient's obligations. Second, we would use existing sanctions and remedies for violation of contracts which provide for a day in court for any aggrieved person. . . .
>
> If my version of title VI is adopted, there will be a redress available, because either party will then be able to go into court for the violation of a contract.
>
> I would eliminate any limitation upon the utilization of the existing body of law of contract for a complete remedy before a court—not the "bobtailed" review of section 10 of the Administrative Procedures Act under which the administrative findings are subject only to a limited review. *Id.* at 2493.

Section 602 of Rep. Meader's amendment would have expressly provided the following:

> The undertaking referred to in section 601 shall contain such appropriate terms and conditions as the head of the department or agency granting the assistance may prescribe. The United States District Courts shall have jurisdiction of civil actions brought in connection with such undertakings by either

Second, Subcommittee No. 5 of the House Judiciary Committee amended the administration's version of the House Bill; and Representative Meader was a member of Subcommittee No. 5.[8]

> The subcommittee also sought to provide for adequate judicial review. Members cited examples of Federal officials withholding funds from States and local governments by arbitrary decision from which no adequate redress appeared to be available.
>
> At one point, in seeking to achieve these objectives a draft was suggested giving administrators of financial assistance programs rule-making authority and then authorizing the enforcement of such regulations against discrimination by injunction processes. In fact, this version of the withholding section was contained in the bill reported by the subcommittee.
>
> A compromise version reported by the full Judiciary Committee struck the government-by-injunction remedy and thus was an improvement over the subcommittee version.
>
> It is my belief that objections of nondiscrimination with respect to Federal financial assistance programs

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the United States or by any recipient aggrieved by action taken under any such undertaking, but no court shall issue an order or injunction restraining a breach of those provisions of the undertaking which are designed to carry out the policy set forth in paragraphs (1) and (2) of section 601.
Id. at 2494.

As other Congressmen recognized, "this amendment would throw this whole problem into the context of contract law." *Id.*

[8] Additional view of Rep. Meader, accompanying H.Rep.No. 914, 88 Cong., 2d Sess., U.S. Code Congr'l & Admin. News, 2412, 2413-15, 2425-26 (1964). See also Minority Report of House Judiciary Committee, U.S. Code Congr'l & Admin. News, 2431, 2454-55 (1964).

> can be achieved in a much simpler and more workable way. We can provide that recipients of Federal financial assistance, as a condition to receiving the grant or loan, must enter into an enforceable undertaking against discrimination in the administration of the program. Such an undertaking would be enforceable by existing law governing remedies for the violation of a contract. Additional views of Rep. Meader, accompany H.Rep.No. 914, 88 Cong., 2d Sess., U.S. Code Congr'l & Admin. News, 2412, 2425 (1964).[7]

The House Judiciary Committee rejected the subcommittee's amended version of the bill.

> The pending bill omitted what was section 703 of the subcommittee proposal affirmatively providing for enforcement by civil action or other proceeding of any rules, regulations, orders, agreements, etc., entered into under this title. It can be readily seen that when the pending bill retained the enforcement provision that the same might be done by "any other means authorized by law," it would include the right to bring a suit to enforce a rule, regulation, order, or agreement, including temporary restraining orders and injunctions. This purported "moderation" or "watering down" of the substitute proposal is neither a "moderation" nor a "watering down." To the contrary, it is a patent attempt to bemuse the opposition and to mislead the citizens of the United States and Members of Congress. Minority Report of House Judiciary Committee, accompanying H.Rep.No. 914, 88 Cong., 2d Sess., U.S. Code Congr'l & Admin. News, 2431, 2454-55 (1964).

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[7] The text of Rep. Meader's substitute bill, in subcommittee No. 5 of the House Judiciary Committee, U.S. Code Congr'l & Admin. News, at 2425-26, is identical to his amendment offered during the floor debates. 110 Cong.Rec. 2479, 2493-94 (Feb. 7, 1964).

Rejecting the subcommittee's amended version, which would have (1) authorized lawsuits to enforce Title VI assurances and agreements, and (2) created a jurisdiction in the district courts to hear and decide such actions, the Judiciary Committee sent to the floor of the House the bill which ultimately became Title VI. As the Minority Report indicates, those members of the Judiciary Committee who had been proponents of the amended version of the bill in the subcommittee, continued to contend that such authority and jurisdiction were nonetheless still available in the majority bill, even though that bill, containing none of the express provisions of the minority's bill, was passed by the Judiciary Committee over the vocal opposition of the minority, and ultimately prevailed in the House over the proposed Meader amendment. That Minority Report contention, however, is really a contrary-to-fact rationalization. It actually underscores the rejection by the prevailing bill of amendments and substitutes which would have provided the authority, and have created the jurisdiction, at issue in defendants' motion to dismiss.

Third, proponents in the Senate, of the House bill that became the 1964 Civil Rights Act, explained their understanding of the phrase "by any other means authorized by law."[8] Those Senators indicated that the language included (1) other administrative procedures then existing and presently available, as well as (2) desegregation litigation based on other laws than Title VI. Senator Stennis had earlier asked about the scope and effect of a provision in Title VI that allowed for the termination of funds.[9] He then asked what the phrase "by any other means authorized by law" meant, noting that "the language itself is very broad."[10]

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[8] 110 Cong.Rec. at 7060-61, 7063, 7065, 7066 (April 7, 1964).

[9] 110 Cong.Rec. at 7058-60 (April 7, 1964).

[10] *Id.* at 7068.

Senator Pastore replied that "this language means there shall be no repeal of laws which Congress has already enacted."[11]

> This phrase does not confer any new authority. It simply makes it clear that Federal departments and agencies may carry out the purposes of title VI by using the powers they now have under the laws creating them or authorizing particular assistance programs.
>
> This alternative is designed to permit the agency to avoid a fund cutoff if some other means of ending discrimination is available. This will enable the agency to achieve compliance without jeopardizing, even in limited fashion, its basic program objective by terminating or refusing aid. Perhaps the best example of this relates to school lunches or other assistance to segregated schools. Cutoff of the lunches or other assistance will obviously impose a severe hardship upon students who are intended to be benefited. The way to avoid such a hardship will be for the Attorney General to institute a desegregation suit under title IV, rather than to terminate assistance.
>
> Again, if an agency's nondiscrimination requirement is embodied in a contractual commitment, the agency may be able to bring suit to enforce its contract. An agency with power to approve or disapprove construction plans or standards could refuse to approve for aid any facilities which would be segregated.
>
> Any such action, however, would have to be based on powers conferred on the agency by some other law than title VI.[12]

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[11] *Id.*

[12] *Id.*

Senator Pastore went on to say that "any agency action taken pursuant to section 602 [of title VI] would be subject to judicial review to the extent and in the manner provided by existing law applicable to similar action taken by the agency on other ground."[13] Later, replying to comments by Senator Philip Hart, Senator Pastore stated:

> A situation might occur in which there might be a hard core, pinpoint condition in a State which could not possibly be tolerated, but the situation in the remainder of the State might be good; the program in the remainder of the State might be administered on a nondiscriminatory basis. However, as the Senator from Connecticut said, not only could the rules and regulations that are promulgated by a nondiscriminatory agency cover that kind of situation, but I suppose that once title VI was enacted, in that particular case it would still be proper for the Attorney General under other titles of this bill, if he were asked to do so, to step in.[14]

The point that Senator Pastore was trying to make was that the overall purpose of Title VI's nondiscrimination mandate was to obtain voluntary compliance, while leaving the law broad enough to take care of situations mentioned by other Senators through administrative rules and regulations promulgated.[15]

Senator Ribicoff then took up the reply to Senator Stennis' question about the meaning of "by any other means authorized by law."

> . . . the distinguished Senator from Mississippi raised the question, "what is meant by the phrase 'or by any other means authorized by law'?"

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[13] *Id.*

[14] *Id.* at 7061.

[15] *Id.*

> It is important to emphasize as the distinguished Senator from Rhode Island has just stated, that this phrase has significance and meaning. Without this phrase, there would only be the remedy of a cutoff of funds. But the words "by any other means authorized by law" give flexibility to permit the agency or the department of the Government to use alternative remedies, under the regulations, just as the distinguished Senator from Rhode Island [Pastore] has pointed out.[16]

The choice of language, "by any other means authorized by law," was intended to encourage "agencies to find ways to end discrimination without refusing or terminating assistance."[17] In short, it was a deliberate choice to promote informal administrative actions to bring about compliance, then if necessary lawsuits based upon laws other than Title VI, before the funds cutoff provision was used as a last resort. The legislative evolution of the phrase "by any other means authorized by law" in Congress indicates that every effort to supply authority and jurisdiction for contract-based lawsuits under Title VI alone was consistently rejected.

II. Subsequent Legislative Indications

Besides the indications in the legislative history of the 1964 Civil Rights Act that Congress rejected attempts to grant expressly authority and jurisdiction for the government to enforce the contractual assurances of nondiscrimination required by Title VI, subsequent congressional legis-

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[16] *Id.*

[17] *Id.* at 7063. *Cf. Santiago v. Philadelphia, Pa.*, 435 F.Supp. 136, 158 (E.D.Pa. 1977), *quoting Johnson v. Chester County, Pa.*, 413 F.Supp. 1299, 1310 (E.D.Pa. 1976): "The scheme of the Civil Rights Act of 1964 [42 U.S.C. § 2000d *et seq.*] is essentially administrative."

lative activity reinforces the view that Congress deliberately excluded authority and jurisdiction for the government to sue, using conditional grants of federal funds to recipients as the basis to seek specific enforcement of a recipient's contractual, nondiscrimination assurances. The history of congressional activity over the past several years underscores a pointed congressional intent to prevent the government from obtaining desegregation of schools by means of suits to enforce contractual, nondiscrimination assurances, and based solely on those assurances as conditions for the receipt of federal funds.

A. 1972 Revenue Sharing Act: 31 U.S.C. § 1221 et seq.

When Congress passed the 1972 Revenue Sharing Act, 31 U.S.C. § 1221 *et seq.*,[18] the statute contained a provision expressly prohibiting discrimination based on "race, color, national origin, or sex", in the grant or denial of funds appropriated by the statute. 31 U.S.C. § 1242(a).[19] In the

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[18] Pub.L. 92-512, 86 Stat. 919 et seq. Oct. 20, 1972.

[19] 31 U.S.C. § 1242(a)(1) provides:

> No person in the United States shall, on the ground of race, color, national origin, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a State government or unit of local government, which government or unit receives funds made available under subchapter I of this chapter. Any prohibition against discrimination on the basis of age under the Age Discrimination Act of 1975 or with respect to an otherwise qualified handicapped individual as provided in 794 of Title 29 shall also apply to any such program of activity. Any prohibition against discrimination on the basis of religion, or any exemption from such prohibition, as provided in the Civil Rights Act of 1964 or Title VIII of the Act of April 11, 1968, hereafter referred to as Civil Rights Act of 1968, shall also apply to any such program of activity.

event that the Secretary of the Treasury determined that a state or local government "failed to comply" with the statute's antidiscrimination provision, or regulations implementing it, the statute specifically authorized the Secretary to attempt informal, voluntary compliance through the particular state's governor. 31 U.S.C. § 1242(b). If after a reasonable time, however, such voluntary compliance did not occur, the statute expressly authorized the Secretary

> . . . (1) to refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted; (2) to exercise the powers and functions provided by Title VI of the Civil Rights Act of 1964; or (3) to take such other action as may be provided by law. 31 U.S.C. § 1242(b).

That express grant of authority to the treasury secretary for the enforcement of the Revenue Sharing Act's nondiscrimination requirement reveals the alternative methods with Congress recognized were available at that time to obtain compliance.[20]

In 1976 the Revenue Sharing Act of 1972 was amended by Congress. One of the purposes of the 1976 amendments was to strengthen and broaden § 1242's nondiscrimination

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Originally, 31 U.S.C. § 1242(a) provided:

> No person in the United States shall, on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under subchapter I of this chapter.

See Pub.L. 92-512, § 122, 86 Stat. 919, 932, Oct. 20, 1972.

[20] S. Rep. No. 1207, 94 Cong.2d Sess., 28, U.S. Code Congr'l & Admin. News, 5151, 5178 (1976), accompanying H.R. 13367 which became Pub.L. 94-488, 90 Stat. 2347, 2350, Oct. 13, 1976.

requirement, so that it could not be easily circumvented.[21] In so doing, Congress revised its express grant of authority to the Attorney General, empowering him whenever he "has reason to believe" that a state or local government "has engaged or is engaging in a pattern or practice" of discrimination prohibited by § 1242(a)(1), to

> . . . bring a civil action in an appropriate United States district court. Such court may grant as relief any temporary restraining order, preliminary or permanent injunction, or other order, as necessary or appropriate to ensure the full enjoyment of the rights described in this action, including the suspension, termination, or repayment of funds made available [by the act], or placing any further payments . . . in escrow pending the outcome of the litigation. 31 U.S.C. § 1242 (g) (Supp. 1977).

The 1976 amendment expanded the Attorney General's authority, expressly authorizing lawsuits to obtain the equitable relief necessary for enforcing § 1242(a)(1)'s nondiscrimination requirement.[22] That express grant of

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[21] S. Rep. No. 1207, 94 Cong., 2d Sess., 3, 27, U.S. Code Congr'l & Admin. News, at 5153, 5177 (1976); H.Conf.Rep.No. 1720, 94 Cong., 2d Sess., 31, U.S. Code Congr'l & Admin. News, 5188, 5199 (1976), accompanying Pub.L. 94-488, § 8(a), 90 Stat. 2347, 2350, Oct. 13, 1976, which amended 31 U.S.C. § 1242. See also remarks of Sen. Bayh (D-Ind.), 122 Cong. Rec. S15777, S15787 (Sept. 14, 1976, daily ed.).

[22] H.Conf.Rep.No. 1720, 94 Cong., 2d Sess., 36, U.S. Code Congr'l & Admin. News, at 5204 (1976); S.Rep.No. 1207, 94 Cong., 2d Sess., at 33, U.S. Code Congr'l & Admin. News, at 5183 (1976). See also 31 C.F.R. § 51.75(a) and (b); 42 Fed.Reg. 18362, 18364 (Apr. 6, 1977).

The 1976 amendment, Pub.L. 94-488, § 7(b), 90 Stat. 2347, 2349, provided for the first time a private cause of action to enforce the Revenue Sharing Act's antidiscrimination provision. 31 U.S.C.

authority also created the corresponding jurisdiction in federal district courts to grant such equitable relief. By increasing the Attorney General's authority in the 1976 amendment of the Revenue Sharing Act, Congress exhibited its ability to confer explicit authority and jurisdiction for the equitable enforcement of a statute's nondiscrimination requirement, when it is the intent of Congress to do so. In contrast, the failure of Congress to provide authority and jurisdiction for the enforcement of Title VI's nondiscrimination requirement indicates the continuing lack of such authority and jurisdiction under Congress' view of Title VI. The absence of any provision authorizing and creating jurisdiction for lawsuits to enforce the contractual assurances of compliance with Title VI's nondiscrimination requirement indicates further, therefore, that the phrase "by any other means authorized by law" was not intended to, and does not, include the equitable remedies of contract law to achieve school desegregation.

B. Equal Educational Opportunities Act: 20 U.S.C. § 1701 et seq.

In 1974, Congress enacted the Equal Educational Opportunities and Transportation of Students Act, 39 U.S.C. 1701 *et seq.*[23] The statute was passed because of explicit congressional findings (1) that school systems segregated according to race, color, sex, or national origin, denied students the equal protection by the laws guaranteed by the Fourteenth Amendment and (2) that Congress ought to specify the priority of appropriate remedies for eliminating such segregation, in order to minimize extensive busing, but without limiting the authority of the courts to fashion remedies that will enforce the Fifth and Fourteenth Amend-

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§ 1244(a). Jurisdiction is expressly created for the district courts and the Attorney General is allowed intervention in such private suits. 31 U.S.C. § 1244(b) and (c).

[23] Pub.L. 93-380, 88 Stat. 514 et seq., Aug. 21, 1974.

ments of the Constitution. 20 U.S.C. §§ 1702, 1713. The Act prohibits in detail various kinds of discriminatory denial of equal educational opportunity, while also disavowing any requirement for racial, color, sexual, or ethnic balance. 20 U.S.C. §§ 1703, 1704. Private individuals and the Attorney General are both authorized to bring suits for violations of the statute's ban against denying equal educational opportunities. 20 U.S.C. § 1706. The federal district courts are granted jurisdiction over such lawsuits. 20 U.S.C. § 1708. The provisions of the Equal Educational Opportunities Act reveal the motivating purpose behind the statute. Congress desired (1) to prohibit discrimination in the availability of educational opportunities; (2) to authorize judicial proceedings by both private individuals and the Attorney General for enforcement of the statute's nondiscrimination mandate; but (3) to restrict the government from seeking, and the courts from ordering, "massive forced . . . busing to achieve racial balance"[24] in schools solely because of statutory violations.[25] The statute is a legislative weather vane of congressional thinking. On the one hand, Congress intended to preclude the government from seeking, and courts from granting, large-scale, disruptive desegregation remedies based merely on violation of federal statutory provisions. On the other hand, the courts must remain unrestricted in their power to redress by means of such remedies genuine violations of the Constitution.

C. Eagleton-Biden Amendment to the FY 78 HEW-Labor Department Appropriation Act

After a long and agonizing struggle over the HEW-Department of Labor Appropriations Act for fiscal year 1978,

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[24] 120 Cong.Rec. H4783 (June 5, 1974, daily ed.).

[25] S.Conf.Rep.No. 1026, 93 Cong., 2d Sess., U.S. Code Congr'l & Admin. News, 4206, 4219-22 (1974).

Congress in December, 1977, passed the Eagleton-Biden Amendment.[36] The amendment provides that

> None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home except for a student requiring special education, to the school offering such special education, in order to comply with title VI of the Civil Rights Act of 1964. For the purpose of this section an indirect requirement of transportation of students includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade-restructuring, pairing, or clustering. The prohibition described in this section does not include the establishment of magnet schools. H.R. 7555, § 208 (June 29, 1977).

The basic purpose of the Eagleton-Biden Amendment is to restrict HEW from using Title VI as a lever to coerce school districts into implementing desegregation plans that require busing of students beyond their neighborhood schools. HEW is the agency primarily charged with enforcing the nondiscrimination mandate of Title VI of the 1964 Civil Rights Act in the area of education. Under the Eagleton-Biden Amendment, no longer can HEW require from school districts desegregation plans that necessarily involve busing of students, as a condition for compliance with the contractual assurances of nondiscrimination required by Title VI as a prerequisite to the receipt of federal

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[36] Pub.L. 95-205, 91 Stat. 1461, Dec. 9, 1977. Section 101 of the joint resolution obliquely incorporates the Eagleton-Biden Amendment as "the Department of Labor, and Health, Education, and Welfare, and related agencies Appropriation Act, 1978 (H.R. 7555) . . . to the extent and in the manner provided for in such Act . . ." Section 208 of H.R. 7555 contains the pertinent language of the Eagleton-Biden Amendment.

funds. *Brown v. Califano,* Case No. 75-1068 (D.D.C. July 17, 1978).

Congressional intent underlying the Eagleton-Biden Amendment is unmistakable: to curtail HEW's informal, administrative methods of exacting from school districts, by means of the strings of federal funds, desegregation plans with inextricably involve busing. But the legislative history behind the amendment does not so much as hint that HEW, or the Department of Justice, could use lawsuits to enforce nondiscrimination assurances given by federal funding recipients as a means to obtain such results. To be sure, that alone would be no more than an argument from silence, equally available to support any number of contentions. However, the Senate proponents acknowledged that the amendment's restrictions on the use of nondiscrimination assurances by recipients of federal funds, to demand desegregation plans involving busing, could in no way affect the power of federal courts to require busing remedies based on a finding that the Constitution had been violated. Senator Biden explained:

> Let us get something straight: This has absolutely nothing to do with court-ordered busing. A court, with or without this amendment, can come along, find a constitutional violation, and order whatever remedy it may choose, including busing, if it desires. So let us understand, the issue has nothing to do with court-ordered busing, period. 123 Cong.Rec.S 10844, S 10915 (June 28, 1977, daily ed.).

Later, Senator Eagleton declared:

> We are not talking about the Constitution. Senator Biden has made that clear. If there is an equal protection clause violation, there is a remedy. The Civil Rights Division can go into the Department of Justice and seek it. HEW can seek it. Aggrieved parents and school children can seek redress in Federal district

> courts for constitutional violations. Senator Biden and I do not tamper with that and do not want to. All we are talking about is a unilateral, in house, bureaucratic, HEW administrative order which orders busing, because they forced them to. If they do not bus, they take away all of their Federal funds, impact aid, title I, just name it. 123 Cong.Rec. at S 10917.

Congressional silence about limiting government lawsuits which would require busing desegregation plans through the specific enforcement of contractual assurances required under Title VI is far more significant when viewed in contrast to (1) Congress' express intention to prohibit HEW administrative efforts that would require busing desegregation plans, and (2) the acknowledgment of senatorial sponsors of the amendment that the power of federal courts to remedy constitutional violations remains unaffected. The significance of that silence is that Congress did not consider government lawsuits to obtain desegregation, based on the enforcement of contractual, non-discrimination assurances by federal funding recipients, as a viable course of action, or one that needed limitation.

III. Judicial Reasoning

There is no conclusive case that has decided the question presented by defendants' motion to dismiss. There are, however, a number of cases on which the government relies for its arguments, just as there are also a number of cases to which defendants look for support for their contentions.

A. Implied Statutory Authority to Sue From the Facial Language of Title VI

One argument that the government raises is that it has a right of action, and authority to sue, implied by the statutory, facial language of Title VI ("by any other means authorized by law"). That argument, however, is a classic

instance of the fallacy known as begging the question at issue. The chief and overriding question presented by defendants' motion to dismiss is whether the language "by any other means authorized by law" supplies authority, and correlative jurisdiction, for the government bringing an action to obtain desegregation relief by means of enforcing the contractual, nondiscrimination assurances of Title VI.

When that authority and jurisdiction are challenged, it is no answer to point to the disputed statutory language as the solution to that dispute. By its argument, the government asks the Court to assume what the defendants contest, and what the government must prove. The government must prove that the language "by any other means authorized by law" in Title VI was intended to, and does include, lawsuits for injunctive, desegregation relief based solely upon alleged violations, and enforcement, of defendants' contractual promises to comply with Title VI's nondiscrimination mandate. The government cannot prove that the contested statutory language in question authorizes this lawsuit by asking the Court to infer such authority from that statutory language. In short, the argument is circular and proves nothing.

B. Nonstatutory Authority to Sue Derived from Federal Common Law

The government's second argument is that it has a nonstatutory right of action, and authority to sue, derived from federal common law. The reasoning is as follows: (1) traditionally under federal common law the government, as sovereign, has the right to dictate and impose the conditions according to which it will enter into contracts, and grant monies and other largess; (2) such conditions, and the acceptance of performance under them, create a binding contract; (3) under federal common law, the government has a right to sue for the enforcement and performance of the conditions constituting the essence of the contract and

the benefit for which the government bargained; and (4) Title VI's language "by any other means authorized by law" contemplates and includes this nonstatutory, federal common law right of action to enforce contracts.

The government relies upon two principal decisions, *Lau v. Nichols,* 414 U.S. 563, 39 L.Ed.2d 1 (1974) and *Bossier Parish School Bd. v. Lemon,* 370 F.2d 847 (5th Cir. 1967). In *Lau v. Nichols,* a large number of non-English-speaking Chinese students sued for relief from an unequal educational system in which they were unable to receive educational instruction. They based their case on the Fourteenth Amendment Equal Protection Clause and Title VI (42 U.S.C. § 2000d et seq.). The Supreme Court avoided a decision on the constitutional issue, holding that under Title VI, such ethnic discrimination was prohibited. 414 U.S. at 566-68, 39 L.Ed.2d at 4-6. The court observed that under Title VI and HEW's implementing regulations, the school district had "contractually agreed to 'comply with Title VI . . .' and also immediately to 'take any measure necessary to effectuate this agreement.'" *Id.* at 568-69, 39 L.Ed.2d at 6. Finally, the Court noted that, despite the possible limits on the government's power to "fix the terms on which its money allotments to the state shall be disbursed," the *Lau* case did not reach those limits. *Id.* at 569, 39 L.Ed.2d at 6.

Bossier Parish School Bd. v. Lemon was an earlier case in which black military personnel stationed at an air force base sued the school board to allow their children to attend the local schools. They sought to enforce a contractual right to attend the local schools without racial segregation. The Fifth Circuit held that the school board had contractually agreed to admit the children of federal military personnel in exchange for the receipt of federal funds. 370 F.2d at 850. Moreover, in accepting federal funds after enactment of the 1964 Civil Rights Act, the school board had agreed also to honor Title VI's prohibition against discrimination.

Id. at 852. The Court of Appeals, therefore, held that the military parents asserted the contractual agreement between the school board and the government for their children's right to attend the local schools. *Id.* at 851. Having established a contractual right, as intended beneficiaries, to attend the schools, they then sued as well to enforce the national, constitutional right to a nonsegregated, nondiscriminatory education. *Id.*

Lau v. Nichols and *Bossier Parish School Bd. v. Lemon* have been widely characterized as establishing that a private cause of action is inferable for large numbers of persons who were intended to be beneficiaries of the contractual, nondiscrimination assurances required of school districts under Title VI and HEW's implementing regulations. *Cannon v. University of Chicago*, 559 F.2d 1063, 1072 (N.D. Ill. 1976) *aff'g* 406 F.Supp. 1257, 1259 (N.D.Ill. 1976), *cert. granted* U.S.L.W. 3803 (June 27, 1978); *Lloyd v. Regional Transp. Authority*, 548 F.2d 1277, 1280 and n. 13, 1284-85 (7th Cir. 1977); *Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 362 (5th Cir. 1977); *Serna v. Portales Municipal Schools*, 499 F.2d 1147, 1152-53, 1154 (10th Cir. 1974); *Green Street Ass'n v. Daley*, 373 F.2d 1, 9 (7th Cir. 1967), *cert. denied* 387 U.S. 932, 18 L.Ed.2d 995 (1967); *New York Stock Exchange, Inc. v. Sloan*, 394 F.Supp. 1303, 1308 (S.D. N.Y. 1975); *Natonabah v. Board of Educ. of Gallup-McKinley County School Dist.*, 355 F.Supp. 716, 724 (D.N. Mex. 1973); *Weinberger v. New York Stock Exchange*, 335 F.Supp. 139, 144 n. 11 (S.D.N.Y. 1971); *Gautreaux v. Chicago Housing Authority*, 265 F.Supp. 582, 583-84 (N.D.Ill. 1967). Although the theory of third party beneficiaries under the contractual assurances between school boards and the government was not expressly raised in *Lau v. Nichols*, the Supreme Court's decision embraced it implicitly. First, the Court explicitly premised its decision on Title VI and the fact that the school district had contractually agreed to abide by Title VI's nondiscrimination requirement. Second, the Court's decision has been recognized, and followed,

as limited to classes or large numbers of intended beneficiaries, but not authorizing causes of action for every private individual who might benefit from a contract between the government and a school district. *Cannon v. University of Chicago*, 559 F.2d at 1072; *Lloyd v. Regional Transp. Authority*, 548 F.2d at 1280 n. 13; *Serna v. Portales Municipal Schools*, 499 F.2d at 1154; *Pabon v. Levine*, 70 F.R.D. 674, 677 (S.D.N.Y. 1976).

In addition, the government points to several other decisions of district courts. One group of cases were prior to the 1964 Civil Rights Act, where the government (like the private plaintiffs in *Bossier Parish School Bd. v. Lemon*) sued for injunctive relief, requiring local schools to honor their contractual agreements by admitting the black school children of federal personnel from nearby military bases. The school districts had agreed, in exchange for federal financial grants, to admit federal military school children to the local schools. In an effort to prevent the black federal school children from attending the adjacent, all-white local schools, the school districts tried to renege on their contractual agreements. The district courts held that the government had specifically contracted for the children of its military personnel to attend the local schools, and was entitled to sue for the specific enforcement of those contracts. *United States v. Sumter County School Dist. No. 2*, 232 F.Supp. 945 (E.D.S.C. 1964); *United States v. County School Bd. of Prince George County, Va.*, 221 F.Supp. 93 (E.D.Va. 1963).

Another group of district court decisions to which the government points have held that, since the government has an interest in preventing racial, color, or ethnic discrimination, under Title VI, in federally funded or assisted programs and activities, a right of action and authority to sue are inferable on behalf of the government from Title VI. *United States v. Texas*, 321 F.Supp. 1043, 1056-57 and n. 18 (E.D.Tex. 1970), *aff'd* 447 F.2d 441 (5th Cir. 1971); *United*

States v. Frazer, 317 F.Supp. 1079, 1083-84, 1089 (M.D.Ala. 1970); *United States v. Tatum Indep. School Dist.*, 306 F. Supp. 285, 288 (E.D.Tex. 1969); *United States v. Frazer*, 297 F.Supp. 319, 322-24 (M.D.Ala. 1968). *Cf. Drennon v. Philadelphia Gen. Hosp.*, 428 F.Supp. 809, 815-16 (E.D. 1977). All of those decisions, while recognizing that there is no specific statutory authority, and corresponding jurisdiction, for the government to enforce contractual assurances under Title VI, nonetheless found a common law, nonstatutory authority and jurisdiction available. Those decisions begin with the premises (1) that the government has the right to impose the conditions by which it will contract with federal funding recipients, and (2) that such conditions constitute binding obligations for the contracting recipients. From those two premises, the district courts for the Middle District of Alabama and the Eastern District of Texas concluded that Title VI neither preempted nor limited the federal common law authority for the government to seek specific enforcement of contractual obligations.

While accepting those two premises, this Court disagrees with the conclusion. First, there is no question that the government has the right to establish the conditions upon which it will grant monies or enter into contracts. *King v. Smith*, 392 U.S. 309, 333 n. 34, 20 L.Ed.2d 1118, 1134 n. 34 (1968); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 295, 2 L.Ed.2d 1313, 1327 (1958); *Oklahoma v. United States Civil Service Comm'n*, 330 U.S. 127, 136, 91 L.Ed. 794, 802 (1947); *Bob Jones University v. Johnson*, 396 F. Supp. 597, 606 (D.S.C. 1974); *United States v. Frazer*, 317 F.Supp. 1079, 1083 (M.D.Ala. 1970), *modif'g* 297 F.Supp. 319, 322 (M.D.Ala. 1968); *United States v. Sumter County School Dist No. 2*, 232 F.Supp. at 950. Second, it is equally unquestionable that the acceptance of federal funds under such conditions, or the agreement to such contractual conditions, create positive, binding obligations. Finally, ordinarily under federal common law such binding contractual

obligations are specifically enforceable, and the government possesses the nonstatutory authority to sue for such specific performance. *Dugan v. United States,* 16 U.S. (3 Wheat.) 172, 181, 4 L.Ed. 362, 364 (1818). *Cf. Rex Trailer Co. v. United States,* 350 U.S. 148, 151, 100 L.Ed. 149, 154 (1956); *United States v. Shanks,* 384 F.2d 721, 723 (10th Cir. 1967).

In *Dugan v. United States,* however, the Supreme Court declared:

> In all cases of a contract with the United States, [it] must have a right to enforce the performance of such contracts, or to recover damages for their violation, by actions in [its] own name, unless a different mode of suit is prescribed by law . . . 16 U.S. (3 Wheat.) at 181, 4 L.Ed. at 364.

The precise question at stake in this case, which defendants raise by their motion to dismiss, is whether Congress, having rejected proposed bills and amendments which would have recognized the common law, nonstatutory right of the United States to sue on the basis of its contracts continued to reject such a right of action in Title VI when providing (1) an administrative, fund-termination procedure as well as (2) "any other means authorized by law." The fact that *Lau v. Nichols, supra,* and *Bossier Parish School Bd. v. Lemon, supra,* provide an implied, nonstatutory right for classes of intended, third-party beneficiaries to enforce the contractual agreements between the government and school boards, does not automatically supply authority for the government to sue on behalf of those third-party beneficiaries. Ordinarily, a party (including the government) cannot sue on behalf of, and to vindicate or enforce, the rights of another. *Shaw v. Garrison,* 545 F.2d 980, 983 (5th Cir. 1977), *rev'd on question of applicable law for survivorship of actions sub nom. Robertson v. Wegmann,* 56 L.Ed.2d 554 (1978); *TOPIC v. Circle Realty,* 532 F.2d 1273, 1275 (9th

Cir. 1976), *cert. denied* 429 U.S. 859, 50 L.Ed.2d 137 (1976); *Hall v. Wooten*, 506 F.2d 564, 566 (6th Cir. 1974); *O'Malley v. Brierley*, 477 F.2d 785, 789 and n. 2 (3d Cir. 1973).

In *United States v. Solomon*, 563 F.2d 1121 (4th Cir. 1977) the Attorney General sued three state officials who were responsible for the administration and operation of the State Hospital for the Mentally Retarded. The government sued without specific statutory authority to do so. The government sought injunctive relief on behalf of the patients to vindicate and enforce their unquestionable rights under the federal Constitution. *Id.* at 1124. The district court had dismissed the case for lack of the government's authority to bring the suit and lack of the court's authority to entertain it. The specific question presented to the Fourth Circuit, on appeal, was "whether the United States or the Attorney had authority to sue to redress the alleged deprivations of the patients' rights," in the absence of any specific and express statutory authority to do so. *Id.* The government could point to no specific statute that explicitly authorized that lawsuit. *Id.* Further, the Fourth Circuit rejected the argument that there was implicit authority in the federal legislation on which the government relied for its lawsuit. *Id.* at 1125. In rejecting the argument of implied authority, the Fourth Circuit significantly noted that over the years the legislative history of the particular federal statute involved demonstrated a repeated rejection by Congress "to enact legislation empowering the Attorney General to bring the type of action or presented by the instant case." *Id.* at 1125 n. 4. Finally, while acknowledging the nonstatutory authority under federal common law for the government to sue in specific kinds of cases, *id.* at 1126, the Fourth Circuit rejected the government's contention that it could bring a Civil Rights Act lawsuit under nonstatutory, common law authority. *Id.* at 1127.

> The instant case is one in the field of civil rights and in this area nonstatutory authority on the part of the

> government to sue has been upheld in cases where the government sought to desegregate public facilities on the ground that segregated facilities constituted an obstruction to the flow of interstate commerce and Congress has exercised its power to outlaw such conduct. . . . [citations omitted].
>
> Where, however, there was no basis on which to claim that interstate commerce was obstructed by a denial of civil rights in violation of some congressional enactment, . . . courts have held that the government lacks nonstatutory authority to sue. *Id.* at 1127-28.

The Fourth Circuit emphasized that there was no question of impermissible burdens upon interstate commerce, *id.* at 1129, so that the United States was not suing to "vindicate the civil rights of individuals while simultaneously vindicating a national interest under constitutional provsions such as the Commerce Clause." *United States v. Board of Educ. of Garfield Hghts City School Dist.*, 435 F.Supp. 949, 954 (N.D.Ohio 1976). Neither was the Fourth Circuit presented with merely a contract suit, for breach of contractual provisions or enforcement of the conditions of contractual grants. *United States v. Solomon*, 563 F.2d at 1129. Instead, the government sought to enjoin the state defendants from violating the constitutional rights of the mentally retarded patients at the state hospital. For such indirect remedies of constitutional violations, there was no nonstatutory authority for the government to sue under federal common law.

In the present case, there is no suggestion that the government seeks to vindicate the Commerce Clause. Neither are there any allegations that the two, 97% black elementary schools in Marion County are impermissibly interfering with interstate commerce. On the other hand, this is not merely a lawsuit for breach of contractual provisions or simply to enforce contractual assurances, although the

government has brought the case in that kind of guise. What the government actually seeks is an injunctive, desegregation remedy for constitutional violations, indirectly by means of alleging a breach of contractual assurances which the government wishes to have enforced.

When Congress enacted the 1964 Civil Rights Act, it persistently and repeatedly rejected attempts to provide remedies under Title VI by means of lawsuits to enforce contractual assurances of nondiscrimination. At the same time, Congress provided for an administrative fund-termination procedure, as well as the use of other existing administrative means and lawsuits available under statutes independent of Title VI. In its more recent legislative activity, Congress has demonstrated its judgment that desegregation remedies involving busing of students are inappropriate for violations of federal statutes, even though the disbursement of federal funds is conditioned under those statutes upon compliance with their non-discrimination requirements.

The Court has struggled long and hard in an attempt to discern why Congress chose to limit the availability of desegregation remedies, involving the busing of students, to actions based upon constitutional violations, rather than the mere violation of federal statutory or contractual rights. In reaching its conclusion, the Court has been guided by *Hills v. Gautreaux*, 425 U.S. 284, 47 L.Ed.2d 792 (1976). In that case, the Supreme Court upheld the federal district court's injunction, after years of litigation, requiring the Chicago Housing Authority and the federal Department of Housing and Urban Development ('HUD') to devise alternative remedies for providing unsegregated public housing in the greater Chicago area. On appeal, the defendants contended that such a remedy was excessive and disproportionate to the alleged wrong. The Supreme Court distinguished its earlier decision in *Milliken v. Bradley*, 418 U.S. 717, 41 L.Ed.2d 1069 (1974), in which an injunctive

remedy affecting numerous school districts was reversed because no genuine violations of the Constitution had been shown or found. However, in *Hills v. Gautreaux, supra,* the Supreme Court declared that "once a constitutional violation is found, a federal court is required to tailor 'the scope of the remedy' to fit the 'nature and extent of the constitutional violation.'" 425 U.S. at 293-94, 47 L.Ed.2d at 801, *quoting Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. at 16, 28 L.Ed.2d at 567. The remedy in *Milliken v. Bradley* had been "impermissible because it was not commensurate with the constitutional violation to be repaired." *Hills v. Gautreaux,* 425 U.S. at 294, 47 L.Ed.2d at 801. The principle that the equitable powers of a federal court to fashion relief are limited to what is necessary and appropriate for remedying a specific constitutional wrong is "not limited to a school desegregation context." *Id.* at 294 n. 11, 47 L.Ed.2d at 802 n. 11. What *Hills v. Gautreaux* means is that the nature and kind of relief available and used should be commensurate to the wrong to be remedied. *Id.* at 297, 47 L.Ed.2d at 803.

Congressional thinking, both at the time that the 1964 Civil Rights Act was passed, and in more recent legislative results, is in accord with that principle. Congress refused to authorize, and has subsequently taken steps to limit the more severe, disruptive desegregation remedies, involving busing of students, simply to redress violations of federal statutes, despite the conditional grant of monies by those statutes. On the other hand, Congress has expressly avoided and respected the federal courts' inherent equitable powers to fashion the most drastic remedies available when necessary to correct genuine violations of the federal Constitution, rather than mere transgressions of federal statutes.

Where, as in Title VI, Congress has created specific rights and specific remedies while rejecting other proposed remedies, those remedies provided are exclusive, notwithstanding the absence of the term 'exclusive', and it is im-

proper to infer other remedies, even those that might have been available under federal common law. *Fleischman Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 719-20, 18 L.Ed.2d 475, 479-80 (1967); *United States v. Madison County Bd. of Educ.*, 326 F.2d 237, 242 (5th Cir. 1964), *aff'g United States v. Biloxi Municipal School Dist.*, 219 F. Supp. 691, 696 (S.D. Miss. 1963). There is every indication from the legislative history and from more recent legislation that Congress intended and recognized the remedies available under Title VI to be (1) an administrative fund-termination procedure; (2) other informal, administrative procedures; (3) referral of a matter to the Department of Justice for an independent action under Title IV; and (4) intervention of the Attorney General in an independent action under Title IX. *Cf. Robinson v. Vollert*, 411 F.Supp. 461, 477 (S.D. Tex. 1976). Those remedies are the exclusive statutory remedies available under Title VI. Hence, although under federal common law, the government might ordinarily have a right to sue for the enforcement of contractual assurances under Title VI, Congress has established the specific and exclusive remedies for dealing with disputes about compliance with Title VI's nondiscrimination assurances. The situation is not unique. In *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 31 L.Ed.2d 658 (1972), the United States Supreme Court held that where a contract with the government contains a disputes clause, providing for the resolution of disputes under the contract by means of a particular executive agency, the decision of that agency is final and may not be challenged by the government in still another forum. In that particular case, the Atomic Energy Commission made the final decision concerning a dispute between the contractor and the government. Despite the language of the disputes clause in the contract, providing for review and determination by the Atomic Energy Commission, the government also sought a determination by the General Accounting Office. The Supreme Court held that the procedures and remedies set

forth in the disputes clause of the contract were exclusive and final and could not be varied or set aside in the absence of bad faith or fraud.

In the present case, Congress has set forth the specific procedures and remedies for disputes over compliance with contractual, nondiscrimination assurances required by Title VI. Section 602 [42 U.S.C. § 2000d-1] is similar to a disputes clause provision in a standard federal procurement contract. The methods for resolving disputes have been exclusively established.

If those remedies are unsatisfactory or inadequate for the government, it must take its case for more effective remedies to the appropriate forum: the Congress. Frequently, in the recent past this Court has been faced with contrary requests to reconstruct statutory language: in two cases, to create jurisdiction; in the other one, to destroy it. *Tatum v. Myrick*, 425 F.Supp. 809 (M.D. Fla. 1977); *Brohl v. Singer Co.*, 407 F.Supp. 936 (M.D.Fla. 1976); *Usery v. Golden Gem Growers, Inc.*, 417 F.Supp. 857 (M.D. Fla. 1976). What the court said in each of those cases is controlling here.

> It is the responsibility of the court to interpret and apply the law, *United States v. Nixon*, 418 U.S. 683, 703, 705, 94 S.Ct. 3090, 41 L.Ed.2d 1039, 1061, 1062 (1974); *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 177, 2 L.Ed. 60 (1803), not to rewrite it. Humanitarian and equitable arguments that would urge the court to do virtually that are in the wrong forum. They should be addressed to the Congress that enacted the statute.

Tatum v. Myrick, 425 F. Supp. at 812; *Usery v. Golden Gem Growers, Inc.*, 417 F.Supp. at 862; *Brohl v. Singer Co.*, 407 F.Supp. at 939. Neither may the Executive Branch, by the fiat of administrative regulations, rewrite a statute in order to supply jurisdiction and authority for remedies that are

not available. The government points out that the Department of Justice and HEW have regulations which purport to authorize suits for injunctive, desegregation remedies, by means of enforcing contractual nondiscrimination assurances under Title VI. 50 C.F.R. § 50.3 and 45 C.F.R. § 80.8 (d). But Executive Branch, administrative regulations are only as good as the legislative statutes underlying them. Administrative regulations are valid only if (1) they are based upon, and issued pursuant to, specific statutes enacted by Congress, and (2) are reasonably related to carrying out the purpose of such statutes. *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 36 L.Ed.2d 318, 330 (1973).

The Court does not hold that the two, 97% black elementary schools in Marion County, Florida, do not constitute violations of the Constitution. Certainly, the Court could not so hold in the face of the prima facie evidence of vestigial, dual education systems. Furthermore, the Court does not hold that the government cannot bring an action to enforce the guarantees of the Fourteenth Amendment, as implemented by the 1964 Civil Rights Act, to require the desegregation of those two elementary schools, if the school board cannot meet its burden to show that they are not vestiges of the former, racially segregated school system. What the Court does hold, however, is that there is no statutory authority, and corresponding jurisdiction, for this particular lawsuit, seeking a constitutionally appropriate remedy of injunctive desegregation, based solely on the specific enforcement of statutorily required, contractual nondiscrimination assurances, which the school district is alleged to have violated. Presented with an action clearly authorized, and for which there is demonstrated jurisdiction, the Court will be swift to order whatever remedies may be required to eradicate any lingering violations of the Constitution. In the meanwhile, the Court must be equally faithful to the limits of its jurisdiction under the Constitution and the federal statutes enacted pursuant to

it. This case will be dismissed without prejudice for lack of authority for the government to bring it, and jurisdiction for this Court to consider it.

Issued at Jacksonville, Florida, this 11th day of August, 1978.

/s/ CHARLES R. SCOTT
Senior United States District Judge

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

No. 78-22-Civ-Oc

UNITED STATES OF AMERICA,
Plaintiff,

v.

MARION COUNTY SCHOOL DISTRICT, *et al.*,
Defendants.

Order

For the reasons set forth in the Court's opinion of this date, it is now

ORDERED:

1. Defendants' motion to dismiss is granted.

2. This case is dismissed without prejudice.

DONE and ORDERED at Jacksonville, Florida, this 11th day of August, 1978.

/s/ CHARLES R. SCOTT
Senior United States District Judge

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
October Term, 19

No. 78-3510

D.C. Docket No. CA-78-22-Civ-OC

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

MARION COUNTY SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

Before BROWN, AINSWORTH and FRANK M. JOHNSON, JR., Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant the costs on appeal, to be taxed by the Clerk of this Court.

September 10, 1980

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ BETTY G. MARTINEZ
Deputy
New Orleans, Louisiana

Issued as Mandate: October 31, 1980

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-3510

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

versus

MARION COUNTY SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion September 10, 1980, 5 Cir., 198—, —— F.2d ——).

(October 23, 1980)

Before BROWN, AINSWORTH and FRANK M. JOHNSON, JR., Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ FRANK M. JOHNSON, JR.
United States Circuit Judge

A true copy
Test: GILBERT F. GANUCHEAU
Clerk, U.S. Court of Appeals, Fifth Circuit

/s/ BETTY G. MARTINEZ
Deputy
New Orleans, Louisiana

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

No. 78-22-Civ-Oc

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARION COUNTY SCHOOL DISTRICT, et al., *Defendants*.

ORDER

For the reasons set forth in the Court's opinion of this date, it is now

ORDERED:

1. Defendants' motion to dismiss is granted.

2. This case is dismissed without prejudice.

DONE and ORDERED at Jacksonville, Florida, this 11th day of August, 1978.

/s/ CHARLES R. SCOTT
Senior United States District Judge

Copies:

Howard L. Feinstein, Esquire
Education Secretary
Civil Rights Division
U.S. Department of Justice
10th & Pennsylvania Ave.
Washington, D.C. 20530

United States Attorney (Yerkes)
Jacksonville, Florida

John P. McKeever, Esquire
Pattillo, MacKay & McKeever
Post Office Box 1450
Ocala, Florida 32670

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-588

MARION COUNTY SCHOOL DISTRICT, ET AL.,
Petitioners,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 20, 1981.

/s/ LEWIS F. POWELL, JR.
Associate Justice of the Supreme Court of the United States

Dated this 9th day of January, 1981.

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APPENDIX G

STATUTES AND REGULATIONS INVOLVED

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* (1976), provides in relevant part:

§ 2000d . . .

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

§ 2000d-1 . . .

Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or

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(2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action, terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 407 of Title IV of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000c-6 (1976), provides in relevant part:

Whenever the Attorney General receives a complaint in writing—

> (1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws,
> . . .

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board . . . and after certifying that he is satisfied that such board . . . has had a reasonable time to adjust the conditions alleged in such

complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) Persons unable to initiate and maintain legal proceedings

The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

(c) "Parent" and "complaint" defined

The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, title 18.

The Equal Educational Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* (1976), provides in relevant part that:

§ 1701 . . .

(a) The Congress declares it to be the policy of the United States that—

(1) all children enrolled in public schools are entitled to equal educational opportunity without regard to race, color, sex, or national origin; and

(2) the neighborhood is the appropriate basis for determining public school assignments.

(b) In order to carry out this policy, it is the purpose of this subchapter to specify appropriate remedies for the orderly removal of the vestiges of the dual school system.

§ 1702 . . .

(a) The Congress finds that—

(1) the maintenance of dual school systems in which students are assigned to schools solely on the basis of race, color, sex, or national origin denies to those students the equal protection of the laws guaranteed by the fourteenth amendment;

(2) for the purpose of abolishing dual school systems and eliminating the vestiges thereof, many local educational agencies have been required to reorganize their school systems, to reassign students, and to engage in the extensive transportation of students;

(3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;

(4) transportation of students which creates serious risks to their health and safety, disrupts the educa-

tional process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;

(5) the risks and harms created by excessive transportation are particularly great for children enrolled in the first six grades; and

(6) the guidelines provided by the courts for fashioning remedies to dismantle dual school systems have been, as the Supreme Court of the United States has said, "incomplete and imperfect," and have not established, a clear, rational, and uniform standard for determining the extent to which a local educational agency is required to reassign and transport its students in order to eliminate the vestiges of a dual school system.

(b) For the foregoing reasons, it is necessary and proper that the Congress, pursuant to the powers granted to it by the Constitution of the United States, specify appropriate remedies for the elimination of the vestiges of dual school systems, except that the provisions of this chapter are not intended to modify or diminish the authority of the courts of the United States to enforce fully the fifth and fourteenth amendments to the Constitution of the United States.

§ 1703 . . .

No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by—

(a) the deliberate segregation by an educational agency of students on the basis of race, color, or national origin among or within schools;

(b) the failure of an educational agency which has formerly practiced such deliberate segregation to take

affirmative steps, consistent with part 4 of this subchapter, to remove the vestiges of a dual school system;

(c) the assignment by an educational agency of a student to a school, other than the one closest to his or her place of residence within the school district in which he or she resides, if the assignment results in a greater degree of segregation of students on the basis of race, color, sex, or national origin among the schools of such agency than would result if such student were assigned to the school closest to his or her place of residence within the school district of such agency providing the appropriate grade level and type of education for such student;

(d) discrimination by an educational agency on the basis of race, color, or national origin in the employment, employment conditions, or assignment to schools of its faculty or staff, except to fulfill the purposes of subsection (f) below;

(e) the transfer by an educational agency, whether voluntary or otherwise, of a student from one school to another if the purpose and effect of such transfer is to increase segregration of students on the basis of race, color, or national origin among the schools of such agency; or

(f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

§ 1704 . . .

The failure of an educational agency to attain a balance, on the basis of race, color, sex, or national origin, of students among its schools shall not constitute a denial of equal educational opportunity, or equal protection of the laws.

§-1706 . . .

An individual denied an equal educational opportunity, as defined by this subchapter may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate. The Attorney General of the United States (hereinafter in this chapter referred to as the "Attorney General"), for or in the name of the United States, may also institute such a civil action on behalf of such an individual.

§ 1710 . . .

The Attorney General shall not institute a civil action under section 1706 of this title before he—

(a) gives to the appropriate educational agency notice of the condition or conditions which, in his judgment, constitute a violation of part 2 of this subchapter; and

(b) certifies to the appropriate district court of the United States that he is satisfied that such educational agency has not, within a reasonable time after such notice, undertaken appropriate remedial action.

§ 1713 . . .

In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, which may involve directly or indirectly the transportation of students, a court, department, or agency of the United States shall consider and make specific findings on the efficacy in correcting such denial of the following remedies and shall require implementation of the first of the remedies set out below, or of the first combination thereof which would remedy such denial:

(a) assigning students to the schools closest to their places of residence which provide the appropriate

grade level and type of education for such students, taking into account school capacities and natural physical barriers;

(b) assigning students to the schools closest to their places of residence which provide the appropriate grade level and type of education for such students, taking into account only school capacities;

(c) permitting students to transfer from a school in which a majority of the students are of their race, color, or national origin to a school in which a minority of the students are of their race, color, or national origin;

(d) the creation or revision of attendance zones or grade structures without requiring transportation beyond that described in section 1714 of this title;

(e) the construction of new schools or the closing of inferior schools;

(f) the construction or establishment of magnet schools; or

(g) the development and implementation of any other plan which is educationally sound and administratively feasible, subject to the provisions of sections 1714 and 1715 of this title.

§ 1714(a) . . .

No court, department, or agency of the United States shall, pursuant to section 1713 of this title, order the implementation of a plan that would require the transportation of any student to a school other than the school closest or next closest to his place of residence which provides the appropriate grade level and type of education for such student.

The Eagleton-Biden Amendment to the Departments of Labor and Health, Education and Welfare Appropriations

Act, 1979, Pub. L. No. 95-480, §§ 207-09, 92 Stat. 1585-86 (1978), *reenacted*, Pub. L. No. 96-123, § 101(g), 93 Stat. 925 (1979); and Pub. L. No. 96-536, § 101(a)(1), 94 Stat. 3166 (1980), provides:

SEC. 208. (a) No part of the funds contained in this title shall be used to force any school or school district which is desegregated as that term is defined in title IV of the Civil Rights Act of 1964, Public Law 88-352, to take any action to force the busing of students; to require the abolishment of any school so desegregated; or to force on account of race, creed, or color the transfer of students to or from a particular school so desegregated as a condition precedent to obtaining Federal funds otherwise available to any State, school district or school.

(b) No funds appropriated in this Act may be used for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to overcome racial imbalance in any school or school system, or for the transportation of students or teachers (or for the purchase of equipment for such transportation) in order to carry out a plan of racial desegregation of any school or school system.

SEC. 209. None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, to the school offering such special education, in order to comply with title VI of the Civil Rights Act of 1964. For the purpose of this section an indirect requirement of transportation of students includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing, or clustering. The prohibition described in this section does not include the establishment of magnet schools.

Department of Health, Education and Welfare, "Nondiscrimination in Federally-Assisted Programs of the Department of Health, Education and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964," 45 C.F.R. § 80.8 (a) (1979), provides:

> If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceeding under State or local law.

Department of Justice, "Guidelines for the Enforcement of Title VI, Civil Rights Act of 1964," 28 Fed. Reg. 333, § 50.3 (1966), provides in relevant part:

> Compliance with the nondiscrimination mandate of Title VI may often be obtained more promptly by appropriate court action than by hearings and termination of assistance. Possibilities of judicial enforcement include (1) a suit to obtain specific enforcement of assurances, covenants running with federally provided property, statements of compliance or desegregation plans filed pursuant to agency regulations, (2) a suit to enforce compliance with other titles of the 1964 Act, other Civil Rights Acts, or constitutional or statutory provisions requiring nondiscrimination, and (3) initiation of, or intervention or other participation in, a suit for other relief designed to secure compliance.

APPENDIX H

[Copy of Form 441-B Assurance of Compliance Submitted by the Marion County School District in 1966]*

ASSURANCE OF COMPLIANCE WITH THE REVISED STATEMENT OF POLICIES FOR SCHOOL DESEGREGATION PLANS UNDER TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

(Name of Applicant)

(hereinafter called the "Applicant")

HEREBY AGREES THAT it will comply with all requirements in the Revised Statement of Policies for School Desegregation Plans under Title VI of the Civil Rights Act of 1964, issued by the U.S. Commissioner of Education (hereinafter called the "Commissioner"), March, 1966 (45 CFR Part 181), which are applicable to plans of the same type as the Applicant's voluntary plan for the desegregation of its school system. The Applicant also agrees that it will comply with any amendment of such Revised Statement, unless after the publication of any such amendment the Applicant shall notify the Commissioner that it does not intend to operate a voluntary plan for desegregation in accordance with such an amendment.

If any real property or structure thereon is provided or improved with the aid of Federal financial assistance extended to the Applicant in reliance on this assurance, this assurance shall obligate the Applicant, or in the case of any transfer of such property, any transferee, for the period during which the real property or structure is used for the purpose for which the Federal financial assistance is extended or for another purpose involving the provision of

* [The government was unable to locate the executed 1966 Assurance of Compliance, and submitted this unsigned copy as an exhibit in the HEW fund-termination proceedings.]

similar services or benefits. If any personal property is so provided, this assurance shall obligate the Applicant for the period during which it retains ownership or possession of the property. In all other cases of extension of Federal financial assistance in reliance on this assurance, this assurance shall obligate the Applicant for the period during which the Federal financial assistance is extended to it.

The Applicant has adopted and is implementing a voluntary plan for desegregation of its school system based on

_____

_____

_____

(specify whether freedom of choice, geographic attendance zones, a combination of both of the foregoing, or other type of plan).

Applicant should check the applicable box below:

☐ Such plan was accepted by the Commissioner prior to the submission of this form and is hereby modified to the extent necessary to comply with the applicable requirements of the Revised Statement of Policies for School Desegregation Plans Under Title VI of the Civil Rights Act of 1964 (45 CFR Part 181).

or

☐ Such plan is submitted herewith.

THIS ASSURANCE is given in consideration of and for the purpose of obtaining any and all Federal grants, loans, contracts, property, discounts or other Federal financial assistance conditioned upon the acceptance by the Commissioner of a Voluntary Plan for Desegregation if such assistance is extended after the date hereof to the Applicant, directly or through an intervening State agency, including installment payments after such date on account of applications for Federal financial assistance which were

approved before such date. The Applicant recognizes and agrees that such Federal financial assistance will be extended in reliance on the representations and agreements made in this assurance, and that the United States or the State agency through which Federal financial assistance is extended, jointly or severally shall have the right to seek judicial enforcement of this assurance. This assurance is binding on the Applicant, its successors, transferees, and assignees, and the person or persons whose signatures appear below are authorized to sign this assurance on behalf of the Applicant.

Dated_____

_____

(County and State in which Applicant is located)

_____

_____

_____

(Applicant's mailing address)

_____

(Applicant)

_____

(President, Chairman of Board, or comparable authorized official)

If any grades are covered by freedom of choice for the 1966-67 school year, state grades so covered: _____

and choice period dates: _____ to _____.

State grades covered by any other type of plan for 1966-67: _____

Specify type of plan: _____

APPENDIX I

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

Washington, D.C. 20201

April 12, 1978

Honorable Drew S. Days
Assistant Attorney General
Civil Rights Division
U.S. Department of Justice
Washington, D.C. 20530

Attention: Mr. Alexander C. Ross
Chief, Education Section

Re: Marion County School District, Florida

Dear Mr. Days:

The purpose of this letter is to refer the case developed by the Department of Health, Education, and Welfare against the Marion County School District, Florida ("District") to the Department of Justice, pursuant to 45 C.F.R. Section 80.8(a). We recommend that the Department of Justice bring appropriate proceedings to enforce the rights of the United States under the laws of the United States, and under assurances or other contractual undertakings, in relation to the District's actions discussed below.

DISCUSSION

On July 25, 1975, the Reviewing Authority (Civil Rights) of the Department of Health, Education, and Welfare found that Madison Primary School and Howard Upper Elementary School, both of which had student bodies which were at least 98 percent black, were vestiges of the formerly dual school system in Marion County. The Re-

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viewing Authority held that because the District had not eliminated all vestiges of the dual system, the District was in noncompliance with the Fourteenth Amendment to the Constitution of the United States, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. However, the Reviewing Authority remanded the case to the Administrative Law Judge in order to ascertain whether the violation of Title VI could be remedied consistent with Public Law 93-380 (Esch Amendment).

The District petitioned for Secretarial review of the July 25, 1975, rulings and order of the Reviewing Authority. However, on December 27, 1976, then-Secretary Mathews denied the petition for review.

On July 18, 1977, a pre-trial conference was held before Administrative Law Judge P. H. Hyden in Macon, Georgia. At that time, counsel for the District stipulated that: (a) Madison Primary and Howard Upper Elementary remained 98% black; (b) the Department had made all necessary efforts to achieve voluntary compliance and negotiations were at an impasse. On July 29, 1977, at the request of the parties, Judge Hyden ordered indefinite postponement of further administrative proceedings in this matter.

The Office for Civil Rights has now reached the following conclusions:

(a) A complete remedy of the District's violation of the Fourteenth Amendment and of Title VI cannot be provided without transportation of some students to a school other than the one closest to their home

(b) The Office for Civil Rights cannot require this transportation by bringing administrative proceedings to terminate assistance, because of Section 208 of the fiscal year 1978 HEW-Labor Appropriation Act, Public Law 95-205, 91 Stat. 1460. Section 208 provides:

> None of the funds contained in this Act shall be used to require, directly or indirectly, the transportation

of any student to a school other than the school which is nearest the student's home, except for a student requiring special education, in order to comply with Title VI of the Civil Rights Act of 1964. For the purposes of this section an indirect requirement of transportation of students includes the transportation of students to carry out a plan involving the reorganization of the grade structure of schools, the pairing of schools, or the clustering of schools, or any combination of grade restructuring, pairing or clustering. The prohibition described in this section does not include the establishment of magnet schools.

(c) The Office for Civil Rights has been unable to secure voluntary compliance with Title VI;

(d) In order to exercise its obligations under both Title VI and the Fifth Amendment of the Constitution of the United States to refrain from providing assistance to school districts which discriminate on the basis of race, OCR is obliged to refer the matter to the Department of Justice for the filing of a lawsuit.

On March 24, 1978, I sent a letter to Mr. Leon Rogers, Superintendent, Marion County School District, pursuant to 45 C.F.R. Section 80.8(d), providing notification that OCR would request the Department of Justice to seek appropriate judicial relief unless within ten days from that date the District submitted a plan to correct the violation of Title VI. I enclose a copy of this letter and a copy of a receipt showing delivery of this letter on March 27, 1978.

Ten days have now elapsed since the date of my letter. The District has not submitted a plan to correct the violation of Title VI. Accordingly, I am hereby referring this case to the Department of Justice, pursuant to 45 C.F.R.

Section 80.8(a), so that your Department can commence appropriate proceedings.

Sincerely,

/s/ WILBERT A. CHEATHAM
for David S. Tatel
Director
Office for Civil Rights

cc: Florida State Board of Education
Mr. Leon Rogers
John P. McKeever, Esq.

APPENDIX J

IN THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Civil Action No. 78-22-Civ-Oc

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARION COUNTY SCHOOL DISTRICT; MARION COUNTY SCHOOL BOARD; DR. CAROLE A. PARRISH, Chairperson; JIM ERGLE, Vice Chairman; J. L. COLLUM, Member; SAM MANSFIELD, Member; CARL FREIMUTH, Member; H. LEON ROGERS, Superintendent, Marion County School District, *Defendants*.

COMPLAINT (INJUNCTIVE RELIEF SOUGHT)

The United States of America by its attorneys alleges:

1. This is an action to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-d *et seq.*; the regulations of the United States Department of Health, Education and Welfare (hereinafter "H.E.W.") in implementation thereof, 45 C.F.R. Parts 80, 81; the Fourteenth Amendment to the United States Constitution; and the contractual assurances and undertakings made by Defendant Marion County School District in consideration of its continued receipt of federal financial assistance.

2. This Court has jurisdiction of this action under 28 U.S.C. § 1345 and 42 U.S.C. § 2000-d *et seq.*

3. Defendant Marion County School District is a public body corporate created by the State of Florida to administer and supervise the public schools within its statutorily prescribed area. Its principal office is in Ocala, Florida.

4. Defendant Marion County School Board is a public body created by the State of Florida to determine and adopt policies and programs for the operation of the Marion County School District. Its principal office is in Ocala, Florida.

5. Defendant Marion County School Board is comprised of Defendants Dr. Carole A. Parrish, Chairperson; Jim Ergle, Vice-Chairman; and J. L. Collum, Carl Freimuth, and Sam Mansfield, Members. Each officer and member of Defendant Marion County School Board resides in Marion County, Florida.

6. Defendant H. Leon Rogers is the Superintendent of Schools for the Marion County School District, and is responsible under the laws of the State of Florida for the administration of the public schools in the Marion County School District under the direction and supervision of Defendant Marion County School Board and the State of Florida, its agents and officers. Defendant Superintendent Rogers resides in Marion County, Florida.

7. Defendant School District is receiving and at all times material has been receiving federal financial assistance.

8. In order to qualify for federal financial assistance, Defendant School District submitted in 1966 and on October 14, 1970 Assurances of Compliance with the provisions of Title VI of the Civil Rights Act of 1964 and the H.E.W. Regulations promulgated thereunder. An executed copy of the 1970 Assurance of Compliance is attached hereto as Exhibit 1.

9. On April 17, 1973, H.E.W. notified Defendant School District of its intention to terminate federal financial assistance on grounds that Defendant School District continued to operate racially identifiable schools as vestiges of its statutory dual school system in violation of Title VI of the Civil Rights Act of 1964 and its implementing regulations, 45 C.F.R. Parts 80, 81.

10. After an administrative hearing, H.E.W. Administrative Law Judge Guy Valentine found on November 14, 1973 that Defendant School District operated a unitary school system.

11. On July 25, 1975, the H.E.W. Civil Rights Reviewing Authority reversed the decision of the Administrative Law Judge, holding that Defendant School District was in violation of Title VI of the Civil Rights Act of 1964 for reason of its continued operation of Madison Street Primary and Howard Upper Elementary Schools as racially identifiable vestiges of Defendant School District's dual system.

12. On December 27, 1976, the Secretary of H.E.W. denied Defendant School District's request for review of the decision of the Civil Rights Reviewing Authority.

13. On April 12, 1978, the Director of H.E.W.'s Office of Civil Rights notified Defendant School District by letter that it was referring the noncompliance case against Defendant School District to the Department of Justice for legal action pursuant to 45 C.F.R. § 80.8. A copy of that letter is attached as Exhibit 2 to this Complaint.

14. Defendant School District is comprised of thirty-one schools, attended by approximately 21,497 students during the 1977-1978 school year, of whom approximately 6,435, or thirty percent, are black. Attached to this Complaint as Exhibit 3 is a list of these schools, the grades they serve, and their enrollment by race for the 1977-78 school year.

15. At all times prior to the 1965-1966 school year the School District was organized and operated as a dual school system based on race, in which white students and faculty and black students and faculty were assigned to separate schools.

16. From 1965-66 through 1973-74 the Defendant School District formulated and implemented desegregation plans

for the school district. None of those plans has resulted in the desegregation of Madison Street Primary School or the Howard Upper Elementary School.

17. Madison Street Primary and Howard Upper Elementary Schools were constructed to serve black students during the period that the school system operated a dual school system based on race. When one set of attendance zone lines were drawn for Defendant School District, the attendance zone lines for these two schools encompassed a black neighborhood in the city of Ocala. At all times since the implementation of desegregation plans by Defendant School District, these two schools have continued to enroll student bodies in excess of 96% black.

18. During the 1977-78 school year, enrollment at these schools was approximately as follows:

School	Black	White	Total	% Black
Madison Street Primary	512	6	518	98.8%
Howard Upper Elementary	352	10	362	97.2%

19. The present assignment policies of Defendant School District with regard to Madison Street Primary School and Howard Upper Elementary School result in racially identifiable vestiges of its former dual school system and perpetuates that dual school system. As such, this policy of Defendant School District denies black students attending those schools equal protection of the laws and subjects them to discrimination on the grounds of race under programs and activities receiving federal financial assistance, all in violation of Title VI of the Civil Rights Act of 1964 and H.E.W. implementing regulations thereunder, in violation of Defendants' contractual assurances, and in violation of Defendants' obligations under the Fourteenth Amendment.

20. Educationally sound and administratively feasible alternative methods of student assignment are available to Defendants, including plans already drawn up by Defendants, which would remove the remaining vestiges of Defendants' dual system by desegregating Madison Street Primary and Howard Upper Elementary Schools.

21. Neither H.E.W. nor the Department of Justice has been able to obtain voluntary compliance by Defendants in the form of submission of a legally acceptable desegregation plan.

22. Unless restrained by Order of this Court, Defendants will continue to maintain and operate Madison Street Primary and Howard Upper Elementary Schools as segregated schools in violation of the laws and Constitution of the United States, resulting in immediate and irreparable injury. No adequate remedy is available at law.

WHEREFORE, plaintiff prays that this Court enjoin Defendants, their successors in office, agents, employees, and all persons in active concert or participation with them from discriminating against the black students attending Defendant School District, and require Defendants to forthwith formulate and implement a desegregation plan for the Madison Street Primary School and Howard Upper Elementary School which will fully disestablish the dual system of schools based on race operated by Defendants by the opening of the 1978-79 school year.

Plaintiff further prays that this Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

GRIFFIN B. BELL
Attorney General

/s/ By: DREW S. DAYS III
Assistant Attorney General
JOHN BRIGGS
United States Attorney, By

/s/ ROBERT S. YERKES
Robert S. Yerkes, Asst. U.S. Attorney

/s/ ALEXANDER C. ROSS
JOSEPH D. RICH
HOWARD L. FEINSTEIN (Trial Counsel)
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 739-4564

Exhibit 1

[1970 Assurance of Compliance Omitted, *see* pp. 23a-24a, *supra*]

Exhibit 2

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20201

April 12, 1978

Mr. H. L. Rogers
Superintendent
Marion County School District
Post Office Box 670
Ocala, Florida 32670

Dear Superintendent Rogers:

I enclose a copy of my letter to the Department of Justice (DOJ) formally recommending that DOJ seek appropriate judicial relief in relation to the District's violation of Title VI of the Civil Rights Act of 1964, 20 U.S.C. Section 2000d *et seq.*

In your letter of March 30, 1978, you advised us that other pressing business prevented the District from formulating quickly any plan which might bring it into compliance with Title VI. You requested that no suit be filed in Federal Court until April 20, 1978, in order that the District could consider whether to file such a plan.

I understand that your District finds it difficult to consider quickly whether to submit a plan to re-assign students to

schools. Members of my staff have been in contact with attorneys at DOJ, and it is our understanding that they will wait until after April 20, 1978, before filing suit in court.

Sincerely,

/s/ WILBURT A. CHATHAM
for David S. Tatel
Director
Office for Civil Rights

Enclosure

[Letter to Department of Justice omitted; *see* Appendix I, pp. 83a-86a, *supra*]

Exhibit 3

MARION COUNTY SCHOOL DISTRICT

School Enrollment and Capacity, 1977-78

—Data Taken From Marion County School District Computer Printout, "Race Breakdown 3/6/78," and Marion County School District, "Updated Information, School Centers, February, 1978"

	Grades	Capacity	White Enrollment	Black Enrollment	Total Enrollment	% Black
Anthony Elem.	K-5	390	313	35	348	10.1
Belleview Elem.	K-2	610	445	72	517	13.9
Belleview-Santos Upper Elem.	3-5	690	462	83	545	15.2
College Park Primary	K-2	600	211	270	481	56.1
Dunnellon Elem.	K-5	690	333	172	505	34.1
East Marion Elem.	K-5	650	604	14	618	2.3
Eighth Street Elem.	K-5	440	240	53	293	18.1
Fessenden Elem.	K-5	625	279	220	499	44.1
Ft. McCoy Elem.	K-5	380	253	12	265	4.5
Highlands Elem.	K-5	780	728	35	763	4.6
Howard Upper Elem.	3-5	595	10	352	362	97.2
Madison Street Primary	K-2	570	6	512	518	98.8

	Grades	Capacity	White Enrollment	Black Enrollment	Total Enrollment	% Black
N.H. Jones Upper Elem.	3-5	630	150	268	418	64.1
Oakcrest Elem.	K-5	680	623	32	655	4.9
Reddick-Collier Elem.	K-5	775	177	362	539	67.2
South Ocala Elem.	K-5	705	620	56	676	8.3
Sparr Elem.	K-5	480	169	138	307	45.0
Stanton Weirsdale Elem.	K-5	750	373	125	498	25.1
Wyomina Park Elem.	K-5	780	619	94	713	13.2
Dunnellon Middle	6-8	455	206	99	305	32.5
Ft. King Middle	6-8	1,458	991	86	1,077	8.0
Howard Middle	6-8	1,290	376	563	939	60.0
Lake Weir Middle	6-8	1,195	838	171	1,009	16.9
North Marion Middle	6-8	1,412	642	451	1,093	41.3
Osceola Middle	6-8	1,315	655	293	948	30.9
Dunnellon High	9-12	699	262	90	352	25.6
Forest High	9-12	2,122	1,345	457	1,802	25.4
Lake Weir High	9-12	1,532	1,096	230	1,326	17.3
North Marion High	9-12	1,643	741	500	1,241	40.3
Vanguard High	9-12	2,205	1,244	564	1,808	31.2
Hillcrest (Special School)	K-12	159	51	26	77	33.8
DISTRICT TOTAL	K-12	27,395	15,062	6,435	21,497	29.9%

VERIFICATION

[Omitted]

No. 80-1413

In the Supreme Court of the United States

OCTOBER TERM, 1980

MARION COUNTY SCHOOL DISTRICT, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JAMES P. TURNER
Acting Assistant Attorney General

JESSICA DUNSAY SILVER
MILDRED M. MATESICH
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Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Attorney General has authority to sue upon referral from the Secretary of Health, Education, and Welfare to enforce Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1, by seeking specific performance of a school district's contractual assurances of nondiscrimination.

2. Whether the Marion County School District was bound by assurances of compliance with the nondiscrimination requirement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, executed by the school district as a condition for its receipt of federal financial assistance.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1413

MARION COUNTY SCHOOL DISTRICT, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 625 F.2d 607. The opinion and order of the district court (Pet. App. 25a-60a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1980 (Pet. App. 61a-62a). The court of appeals denied a petition for rehearing on October 23, 1980 (Pet. App. 63a-64a). On January 9, 1981, Justice Powell extended the time for petition-

ing for a writ of certiorari to February 20, 1981 (Pet. App. 65a), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. It is undisputed that until 1965 the Marion County School District ("school district") operated a *de jure* racially segregated school system (Pet. App. 25a). The facts alleged in the government's complaint show that two elementary schools, formerly all black under the dual system—Madison Street Primary and Howard Upper Elementary—continue to have black enrollments in excess of 96% despite the school district's implementation of various desegregation plans (*id.* at 89a-90a). The attendance zone for these two schools encompasses a black neighborhood in Ocala, Florida, and in 1977-1978 the enrollment at Madison was 98.8% black and at Howard it was 97.2% black (*id.* at 90a). The complaint alleged that, through its student assignment policies, the school district has perpetuated these vestiges of its former dual system (*ibid.*).

From 1966 on, the school district, in exchange for a substantial amount of federal financial aid, has furnished assurances to the Department of Health, Education, and Welfare ("HEW")[1] that it will comply with Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d.[2] Title VI prohibits discrimination on the basis of race, color, or national origin in programs or activities receiving federal financial assist-

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[1] Since May 1980 assurances of compliance have been filed with the Office of Civil Rights of the Department of Education.

[2] The relevant portions of Title VI are reproduced at Pet. App. 69a-70a.

ance.[3] In 1971 HEW began a review of the school district's desegregation efforts in light of this Court's decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and the continued operation of Madison and Howard as racially identifiable schools (R. 23, 83-84).[4] When efforts to obtain voluntary compliance with the school district's nondiscrimination assurance failed, HEW on April 17, 1973, notified the school district of its intent to begin proceedings to terminate federal financial assistance (R. 23, 84). An administrative law judge conducted a hearing and concluded that the school district was unitary and in compliance with Title VI (R. 23, 84-85). However, HEW's Reviewing Authority unanimously reversed the administrative law judge's decision on July 25, 1975 (R. 23, 85), concluding that the Madison and Howard schools were vestiges of the school district's former dual system in violation of the Fourteenth Amendment and Title VI (Pet. App. 83a-84a). The Secretary of HEW

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[3] The assurance also obligates an applicant for federal funds to comply with all regulations issued pursuant to Title VI (Pet. App. 23a). See 45 C.F.R. Parts 80, 81. The duration of the applicant's obligation depends on the nature of the financial assistance received. If real property is provided, the applicant is obligated for the period during which the property is used for the purpose for which the federal aid was extended (Pet. App. 23a). If personal property is provided, the applicant is obligated so long as it retains ownership or possession of the property (*ibid.*). In all other cases, the applicant is obligated for the period during which the financial aid is extended (*ibid.*).

The school district furnished HEW with assurances of compliance in 1966 and 1970; a copy of the 1970 assurance was attached to the complaint in this case (Pet. App. 2a n.1).

[4] "R." refers to the record in the district court.

denied the school district's petition for review of the Reviewing Authority's decision and fund termination proceedings were commenced (Pet. App. 84a).

In July 1977 HEW's administrative fund termination proceedings were suspended by stipulation (R. 23-24, 85). HEW subsequently concluded that the Madison and Howard schools could not be desegregated without transporting some students to a school other than that nearest their home (Pet. App. 84a). HEW could not seek such relief itself because of the specific prohibition of the Eagleton-Biden Amendment (Section 209 of the Department of Labor and Health, Education, and Welfare Appropriations Act, 1978, Pub. L. No. 95-480, 92 Stat. 1586) against HEW's use of federal funds to require transportation of any student to a school other than the school nearest the student's home (Pet. App. 84a-85a).[5] Since efforts to obtain the school district's voluntary compliance had failed (*id.* at 85a), HEW's only recourse in seeking to fulfill its obligations under Title VI and the Fifth Amendment was to refer the matter to the Attorney General for initiation of suit as provided in 45 C.F.R. 80.8(a) (Pet. App. 85a-86a).[6]

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[5] The full text of the Eagleton-Biden Amendment is reproduced at Pet. App. 76a-77a.

[6] 45 C.F.R. 80.8(a) provides in pertinent part (emphasis supplied):

> If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law. *Such other means may include, but are not limited to, (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United*

2. On May 23, 1978, the United States filed a complaint against the school district in the United States District Court for the Middle District of Florida, seeking to enforce Title VI by specific performance of the school district's assurance of compliance with Title VI and its implementing regulations (Pet. App. 87a-92a). The complaint alleged that the school district breached its nondiscrimination assurance by assigning students in a manner that maintained racially identifiable schools, thereby perpetuating its former dual system in violation of the Fourteenth Amendment and Title VI (*ibid.*).

The district court dismissed the complaint without prejudice on the ground that the United States has no authority to secure compliance with Title VI by an action to enforce the school district's contractual assurances of nondiscrimination made as consideration for federal financial assistance (Pet. App. 29a-30a). While agreeing that the "prima facie evidence of vestigial, dual education systems" (*id.* at 58a) shifted to the school district the "heavy" burden of proof (*id.* at 26a) that the two formerly segregated schools were not lingering vestiges of the *de jure* segregated system, the court concluded that it lacked jurisdiction to reach the merits of the case (*id.* at 30a, 59a). The court reasoned that 28 U.S.C. 1345, the provision under which the government filed suit, confers jurisdiction only for actions expressly authorized by statute (Pet. App. 29a).

The district court also stated that Congress intended to forbid the United States to exercise its common law contract right to enforce contractual

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States under any law of the United States (including other titles of this Act), or any assurance or other contractual undertaking * * *.

assurances of compliance executed by recipients of federal financial assistance (Pet. App. 37a-38a). While the court acknowledged that the United States has a well-established common law right to sue for specific enforcement of contracts to which it is a party (*id.* at 50a-51a), it concluded that this right was not included in Title VI's authorization to seek compliance by fund termination or "by any other means authorized by law" (*id.* at 56a). Rather, the court believed that enforcement of Title VI is strictly limited to (1) fund termination procedures; (2) informal administrative efforts to achieve voluntary compliance; (3) suits by the Attorney General under Title IV of the Civil Rights Act, 42 U.S.C. 2000c-6; and (4) intervention by the Attorney General in private suits pursuant to Title IX of the Civil Rights Act, 42 U.S.C. 2000h-2 (Pet. App. 56a). Accordingly, the court invalidated HEW's regulations authorizing the Secretary to refer matters to the Attorney General for suits to enforce assurances of compliance with Title VI (Pet. App. 58a) and dismissed the government's complaint (*id.* at 59a).

3. On September 10, 1980, the court of appeals unanimously reversed the district court, upholding the authority of the Attorney General to bring, and the jurisdiction of the federal courts to resolve, suits to enforce contractual assurances of compliance with Title VI by recipients of federal funds (Pet. App. 21a-22a).

The starting point for the court of appeals' analysis was the well-settled right of the government to fix the terms and conditions upon which it disburses federal funds and to sue for enforcement of those conditions (Pet. App. 3a-5a). Noting that this right exists as a matter of common law, the court of appeals concluded that the district court erred in determining

that Congress has deliberately nullified the right when the United States seeks to enforce assurances of nondiscrimination in the operation of public schools (Pet. App. 6a-7a).

The court of appeals found no basis in the legislative history of the Civil Rights Act of 1964 for the inference that Congress intended the statute's enumerated means of eliminating discrimination in public schools to be the *exclusive* means of accomplishing that goal (Pet. App. 8a-10a). On the contrary, the court of appeals observed that the explicit language of the Act—in particular Section 602 of Title VI (42 U.S.C. 2000d-1)—and the Act's legislative history manifest congressional approval of suits by the United States to enforce Title VI by seeking specific performance of contractual assurances of nondiscrimination (Pet. App. 10a & n.12). In addition, the court found support for this authority in HEW's implementing regulations interpreting the Act to authorize such litigation (*id.* at 10a-12a & n.13). The court of appeals noted that no other court has held that the Civil Rights Act prohibits such suits to enforce Title VI, and a number of courts have recognized that such suits are proper (*id.* at 12a-13a n.14).

Turning to the school district's contention that the Eagleton-Biden Amendment prohibits the Attorney General from suing to enforce Title VI assurances when specific performance would require transportation of students beyond their neighborhood schools, the court of appeals found that nothing in the language of the amendment or its legislative history supports that argument (Pet. App. 14a). The court pointed out that, in enacting the amendment, Congress intended only to prevent HEW from using its own administrative proceedings to require school dis-

tricts to adopt busing plans (*id.* at 15a). The Amendment thus leaves the courts free to mandate student reassignments involving transportation when necessary in desegregation suits such as this in which the Attorney General, on referral from HEW, seeks to enforce a school district's obligation under Title VI (*id.* at 15a-16a). The court noted that the contrary interpretation urged by the school district would raise questions as to the constitutionality of the Eagleton-Biden Amendment itself since, by depriving the United States of any means to challenge discriminatory practices remediable only through student transportation and by requiring HEW to continue to fund school districts engaged in discrimination, the Amendment would compel the United States to violate the Constitution (*id.* at 17a-19a).

Concluding that "the United States is entitled to sue to enforce contractual assurances of compliance with Title VI's prohibition against discrimination in the operation of federally-funded schools, and that the United States is entitled to whatever relief is necessary to enforce such assurances, including 'transportation relief,' " the court of appeals reversed the district court's dismissal of the complaint and remanded the case for further proceedings (Pet. App. 21a-22a).

ARGUMENT

The decision of the court of appeals, upholding the well-settled right of the United States to sue to obtain compliance with Title VI by recipients of federal funds, is correct. Despite their characterization of that decision as "unprecedented" and "unjustifi[ed]" (Pet. 11), petitioners raise no question warranting review by this Court. Nor do petitioners cite any case that adopts their position, other than the decision of the district court.

The court of appeals correctly found that the Civil Rights Act of 1964 not only does not prohibit, but in fact expressly authorizes, litigation by the United States to enforce the nondiscrimination requirement imposed by Title VI. While subsequent legislation has limited the power of HEW to require transportation of students as a desegregation remedy in *administrative* proceedings, Congress has not forbidden the Attorney General from seeking court-ordered transportation to eliminate unlawful segregation by a school district receiving federal funds.

Petitioners also assert that the court of appeals misinterpreted the school district's contractual assurance as requiring the district to meet currently enforceable desegregation standards "even if the District were never to receive another cent of federal aid" (Pet. 22). In view of petitioners' continued receipt of federal financial assistance, that claim is purely hypothetical. Moreover, to the extent that this argument rests on petitioners' allegation—raised for the first time in this Court—that they were bound only by the 1966 assurance and not by the assurance executed by the school board chairman on October 14, 1970 (Pet. 23), that argument presents a factual issue not before the district court on the motion to dismiss the complaint, and thus not appropriate for resolution by this Court. *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

1. *a.* Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, prohibits discrimination on the basis of race, color or national origin with respect to any program or activity receiving federal financial assistance. Federal agencies administering federally funded programs are required by Title VI to adopt

substantive regulations and they may secure compliance with such regulations (42 U.S.C. 2000d-1):

> (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement * * * or (2) by any other means authorized by law * * *.

As the court of appeals recognized, resolution of the question in this case turns on whether Title VI's mandate to secure compliance "by any other means authorized by law" includes litigation such as the present suit instituted by the Attorney General. The court of appeals' affirmative answer to that question is solidly grounded on (1) well established principles of statutory construction; (2) the legislative history of Title VI; (3) the contemporaneous construction of that statute by HEW, an administrative agency charged with implementing it; and (4) settled case law.[7]

Given the well established common law right of the United States to attach conditions to grants of fed-

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[7] Petitioners describe the court of appeals' decision as "unprecedented" (Pet. 11) and assert that the legal theory supporting it is "novel" (*id.* at 24 n.14). But, as the court of appeals noted (Pet. App. 12a n.14), apparently the only court to adopt petitioners' view of Title VI is the district court in this case. Several other courts have recognized that suits such as this by the Attorney General seeking specific performance of contractual nondiscrimination assurances are proper. See, *e.g.*, *United States* v. *Tatum Independent School District*, 306 F. Supp. 285, 288 (E.D. Tex. 1969); *United States* v. *Frazer*, 297 F. Supp. 319, 322-324 (M.D. Ala. 1968); *Brown* v. *Califano*, 627 F.2d 1221, 1232 n.67 (D.C. Cir. 1980).

eral assistance and to sue for enforcement of those conditions (Pet. App. 3a-7a), the court of appeals concluded that, in light of this Court's decisions, a legislative limitation on that right should not be implied in the absence of clear and specific language to that effect (Pet. App. 7a-8a & n.6). As this Court stated in *United States* v. *Stevenson*, 215 U.S. 190, 197 (1909),

> [t]he rule which excludes other remedies where a statute creates a right and provides a special remedy for its enforcement rests upon the presumed prohibition of all other remedies. If such prohibition is intended to reach the Government in the use of known rights and remedies, the language must be clear and specific to that effect.

In this case, petitioners can point to "no persuasive, much less unmistakable, evidence that Congress intended to eradicate or even restrict the United States' right to sue to enforce contractual assurances of nondiscrimination in the operation of public schools" (Pet App. 8a). Accordingly, their contention that Congress has prohibited the Attorney General from bringing suits of the type involved here is without merit.

b. The legislative history of Title VI unequivocally demonstrates Congress' understanding that the phrase "any other means authorized by law" includes suits by the United States to enforce assurances of the type at issue here. When asked on the floor of the Senate about the meaning of that phrase, Senator Pastore, a sponsor of the Act, replied: "Again, if any agency's nondiscrimination requirement is embodied in a contractual commitment, the agency may be able to bring suit to enforce its contract." 110 Cong. Rec. 7060 (1964). Senator Ribicoff, another sponsor, described such a suit as "the most effective way for an agency to proceed." *Id.* at 7066. Urging this

Court to overlook these statements, petitioners argue that, because the Civil Rights Act enumerates specific kinds of desegregation litigation to be brought by the United States (suits under Title IV and intervention in private suits under Title IX), those are the exclusive means by which the Attorney General can challenge discrimination in the operation of public schools (Pet. 12-18). The court of appeals correctly rejected that contention (Pet. App. 9a-12a).

As the court of appeals recognized (Pet. App. 10a), the Civil Rights Act nowhere states that suits under Title IV and intervention under Title IX are to be the exclusive means for eliminating discrimination in the operation of public schools. Section 602 of Title VI permits enforcement by "any other means authorized by law"—not "any other means authorized by this statute." Moreover, Title XI of the Act, 42 U.S.C. 2000h-3, expressly provides that:

> Nothing in this Act shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General or of the United States or any agency or officer thereof under existing law to institute or intervene in any action or proceeding.

Petitioners' contention that the other provisions of the Civil Rights Act were intended to limit the right of the United States to condition grants of money on agreements not to discriminate and its right to sue to enforce those conditions cannot be reconciled with the explicit terms of Title XI.

In addition, the legislative history of Title VI demonstrates that fund termination was not favored as a means of enforcing Title VI's nondiscrimination requirement. To assure that an agency would not lightly cut off funds, the House committee proposal was amended to include a number of procedural safe-

guards in the fund termination process. See, *e.g.*, the discussion of amendments requiring thirty days' notice to the congressional oversight committee (110 Cong. Rec. 2498-2499 (1964)); requiring presidential approval of agency regulations under Title VI (110 Cong. Rec. 2500 (1964)); and requiring administrative hearings prior to fund termination (110 Cong. Rec. 2506 (1964)).

The Act's Senate sponsors repeatedly emphasized in the debates that administrative fund termination would be used "[o]nly as a last resort" (110 Cong. Rec. 7060 (1964) (Senator Pastore)), and that suits to end discrimination were preferable to fund termination that would injure innocent beneficiaries of federally funded programs (110 Cong. Rec. 7065 (1964) (Senator Ribicoff)). Petitioners' contention that Congress intended to restrict suits to secure compliance with Title VI, and intended to rely chiefly on devices such as fund termination, cannot be squared with this legislative history.

c. HEW's regulations implementing Title VI, issued shortly after its passage, provide additional support for the authority of the Attorney General to bring this suit. In 45 C.F.R. 80.8(a) HEW explicitly provided that, in the event of a federal fund recipient's noncompliance with Title VI, the agency can refer the matter to the Department of Justice for appropriate proceedings "to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking * * *." The court of appeals recognized that, as a contemporaneous construction of Title VI by an agency charged with its execution, this interpretation by HEW of its authority and the authority of the Department of Justice under Title VI is strong evidence of legislative intent

(Pet. App. 11a-12a n.13). See also 28 C.F.R. 50.3 (Department of Justice guidelines for the enforcement of Title VI, promulgated in 1966).[8]

d. Petitioners rely on the Eagleton-Biden Amendment and its predecessor limitations on the authority of HEW to require transportation of students as a desegregation remedy[9] as evidence of a "congres-

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[8] Petitioners also claim that the more "specific" provisions of the Equal Educational Opportunities Act of 1974 ("EEOA"), 20 U.S.C. 1701 *et seq.* (which includes a prohibition against seeking student transportation as a desegregation remedy), override the "general" directives of Title VI (Pet. 14, 18-19). But there is nothing in the language or the legislative history of the EEOA to suggest that Congress intended it to be the "exclusive" means by which the United States could seek judicial redress in school desegregation cases. As the Sixth Circuit recognized in *United States* v. *School District of Ferndale*, 577 F.2d 1339, 1345-1346 (1978)—a case on which petitioners erroneously rely—the EEOA provides an additional statutory basis for the United States to initiate school desegregation suits along with equal protection claims raised in suits under Title IV of the Civil Rights Act. The EEOA is no more a limitation on the Attorney General's power to seek specific performance of a school district's nondiscrimination obligation under Title VI than it is a limitation on the Attorney General's power to seek transportation relief in a desegregation suit under Title IV.

Moreover, the EEOA and Title VI apply to two different subjects, the former applying solely to school desegregation, and the latter applying to any kind of program—educational or otherwise—receiving federal funds. Nothing in the language of either statute suggests that it is appropriate to limit the Attorney General's power to seek judicial enforcement of nondiscrimination assurances by school systems while leaving that power undisturbed as to nondiscrimination assurances by other recipients of federal funds.

[9] The Eagleton-Biden Amendment was preceded by the Esch Amendment, Pub. L. No. 93-380, Section 215(a), 88 Stat. 517, codified at 20 U.S.C. 1714(a), and several versions

sional policy" against busing. Petitioners further contend that this policy would be circumvented if the Attorney General is permitted to seek transportation relief in suits for specific performance of Title VI assurances (Pet. 11-15). In making that claim, petitioners use the phrase "Executive Branch" as though HEW and the Department of Justice were a single entity. But an amendment to the HEW appropriation bill plainly does not apply to the Department of Justice, and the legislative history makes clear that Congress intended to preserve the Attorney General's litigating authority in the area of Title VI enforcement.

The legislative history of the Eagleton-Biden Amendment clearly established "that Congress intended to prevent the HEW bureaucracy from acting solely on its own authority in *administrative* proceedings to coerce local school districts into adopting busing plans" (Pet. App. 14a-15a; emphasis in original). Congress' intent to permit the Attorney General to continue to seek transportation as a remedy in litigation brought under Title VI is apparent from the words of Senator Eagleton himself, who emphasized in the course of the floor debate that (123 Cong. Rec. 21246 (1977)):

> when HEW determines that compliance with title VI requires that students be bused, because of the grave consequences to a community that very often accompany such a requirement enforcement may not proceed through the administrative process. HEW is authorized under title VI to refer matters to the Department of Justice for litigation; this is the course that should

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of the Byrd Amendment, Pub. L. No. 94-206, Section 209, 90 Stat. 22; Pub. L. No. 94-439, Section 208, 90 Stat. 1434; and Pub. L. No. 95-205, Sections 101, 106, 91 Stat. 1460-1461.

> be pursued if there is a decision to go forward in a case to which the [Eagleton-Biden] amendment applies.

Thus, Congress deliberately left undisturbed the power of the Attorney General to sue for whatever remedy is necessary to end discrimination in a school system receiving federal funds. The court of appeals' decision on that issue is correct and does not warrant review by this Court.[10]

2. Petitioners also challenge the court of appeals' interpretation of their assurance of compliance.[11] They contend (Pet. 22) that the court's interpretation will subject the school district "to desegregation obligations in perpetuity" instead of "an exchange of one year's federal funds for one year's compliance with federal desegregation guidelines." [12] That conten-

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[10] The court of appeals recognized, as did the District of Columbia Circuit in *Brown* v. *Califano, supra,* that in choosing not to narrow the Attorney General's enforcement power in school desegregation suits brought under Title VI, Congress may well have "saved" the constitutionality of the Eagleton-Biden amendment (Pet. App. 17a-19a). Petitioners neither cite *Brown* v. *Califano* nor address the serious constitutional problems created by their theory which, if applied in a case such as this, would leave HEW with no alternative but to continue federal financial assistance to an unconstitutionally segregated school system. That assistance itself would arguably violate the Constitution. See *Norwood* v. *Harrison,* 413 U.S. 455, 463-468 (1973); *Cooper* v. *Aaron,* 358 U.S. 1, 19 (1958).

[11] As previously noted, petitioners argue for the first time in this Court that they were legally bound by the 1966 assurance but not by the 1970 assurance. It is, of course, inappropriate to attempt to litigate in a petition for certiorari a factual question never raised in the district court or the court of appeals.

[12] But see note 3, *supra.*

tion is conspicuously devoid of any reference to the record. Petitioners do not identify where in its opinion the court of appeals rendered this "erroneous interpretation." The only issue before the court of appeals and the only issue presented for this Court's consideration by the petition for certiorari is whether the district court erred in dismissing the government's complaint on jurisdictional grounds. Accordingly, this case presents no occasion for reviewing petitioners' arguments on the merits of the case or the form of relief that may be appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

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No. 80-1413

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MARION COUNTY SCHOOL DISTRICT; MARION COUNTY SCHOOL BOARD; SAM MANSFIELD, Chairman; LAMAR LUFFMAN, Vice Chairman; CAROL A. PARRISH, Member; J. L. COLLUM, Member; NATHAN GILMAN, Member; H. LEON ROGERS, Superintendent, Marion County School District, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITIONERS' REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1413

MARION COUNTY SCHOOL DISTRICT; MARION COUNTY SCHOOL BOARD; SAM MANSFIELD, Chairman; LAMAR LUFFMAN, Vice Chairman; CAROL A. PARRISH, Member; J. L. COLLUM, Member; NATHAN GILMAN, Member; H. LEON ROGERS, Superintendent, Marion County School District, *Petitioners,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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PETITIONERS' REPLY BRIEF

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1. The Solicitor General's Brief in Opposition is, unfortunately, not candid with this Court. The government asserts that the decision of the court of appeals merely upholds a "well-settled right," and it disputes our characterization of the decision below as "unprecedented" and "novel" (Br. in Opp. 8, 10). The Department of Justice's own actions, however,

prove how path-breaking the Civil Rights Division considers this very case.

Since September 10, 1980, when the Court of Appeals approved the contract theory on which the government relies, the Department of Justice has filed three school desegregation lawsuits asserting this legal theory.[1] All these cases had been referred by HEW to the Department of Justice long before they were filed. Plainly, the decision on whether to institute a lawsuit in each instance was deliberately delayed until the court of appeals would decide the *Marion County* case.

We call to the Court's attention the dates on which each of the three recent cases was referred to the Department of Justice and on which each was filed. The Court will note that the case involving the Big Spring Independent School District of Texas was referred to the Department of Justice on June 8, 1978, but was not filed in federal court until September 18, 1980, more than a week after the *Marion County* decision. Similarly, the case involving the Marshall (Texas) Independent School District was referred on December 26, 1978, but was not filed in federal court until December 2, 1980. And the case involving the City of Chicago was referred by HEW on October 29, 1979, for "appropriate legal action to secure compliance by the Board of Education with Title VI and said Assurances" (*United States* v. *Board of Ed. of*

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[1] We are lodging copies of the three complaints, together with the complaint in the *Marion County* case, with this Court. In the Appendix to this Reply Brief, we reproduce the first paragraphs of each of these complaints, which explain their jurisdictional basis and describe the nature of the claim.

the City of Chicago, Complaint, ¶ 12). Yet the lawsuit was not filed until September 23, 1980—almost two weeks *after* the *Marion County* decision. If the legal principle entitling the United States to sue is so "well-settled," why were these lawsuits delayed until after the *Marion County* decision?

In answer to our Freedom of Information Action request (*see* Pet. 24, n. 14), the Department of Justice provided not a single complaint filed before September 10, 1980 (other than its *Marion County* test case) in which the jurisdictional allegation stated that the action was to enforce "the contractual assurances and undertakings" provided by a defendant school district pursuant to Title VI.[2] That jurisdictional language appears in Paragraph 1 of the *Marion County* complaint and in the first paragraph of each of the three cited lawsuits filed since September 10, 1980.

The conclusion is virtually inescapable that the Department of Justice was awaiting the court of appeals' decision in this case to see whether the appellate court would sustain its new theory—which renders nugatory all other federal laws authorizing public school deseg-

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[2] The government's brief cites only one district court case for this purportedly established proposition (*United States* v. *Tatum Indep. School District,* 306 F.Supp. 285 (E.D. Tex. 1969)) and dictum in the sixty-seventh footnote of one court of appeals ruling (*Brown* v. *Califano,* 627 F.2d 1221, 1232 n. 67 (D.C. Cir. 1980)). (*United States* v. *Frazier,* 279 F.Supp. 319 (M.D. Ala. 1968), did not involve enforcement of an Assurance of Compliance submitted by a public school. It involved a pledge of nondiscrimination in the recruitment, hiring, and promotion of State personnel administering federally funded public assistance programs.) Neither *Tatum* nor *Brown* analyzed the question whether an action on an assurance was permissible under Title VI in light of the specific provisions of Title IV.

regation litigation by the United States. Once the Fifth Circuit issued its decision on September 10, 1980, the other cases based on this theory could be initiated and pursued. If, on the other hand, the Fifth Circuit's ruling merely implemented a "well-settled right," there was no reason whatever to delay these suits.

2. It is obviously important that school district personnel throughout the United States, as well as federal courts across the land, know promptly whether the Justice Department's novel legal theory is valid. If it is, there will surely be a substantial increase in the volume of school desegregation lawsuits seeking transportation relief. A greater burden will be cast on the federal courts, and school personnel will have to budget costs and assign administrative personnel for anticipated busing litigation brought by the United States.

3. The Solicitor General's argument that lawsuits to enforce desegregation assurances filed under Title VI are merely enforcement of a "condition to [the] grants of federal assistance" (Br. in Opp. 10-11) overlooks the fact that the authority to secure such assurances began with Title VI of the Civil Rights Act of 1964. Thus, the government's reliance on Title XI of the 1964 Act, which preserves rights the United States had "under existing law to institute or intervene in any action or proceeding," (*see* Br. in Opp. 12) did not impliedly preserve any right to sue on an Assurance of Compliance. There was, in short, no right "under existing law" prior to the adoption of the 1964 Act to compel a School District to abide by a contractual obligation to desegregate.[3] Indeed, the Fifth

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[3] The intense legislative debates over the wisdom of Title IV make it clear that Congress first empowered the United States to bring any form of desegregation action with the passage of Title

Circuit's ruling in *United States* v. *Madison County Board of Education*, 326 F.2d 237 (5th Cir.), *cert. denied*, 379 U.S. 929 (1964), conclusively establishes that no such contractual right existed before the enactment of the Civil Rights Act of 1964.[4]

And it would have made no sense whatever for Congress carefully to limit, in Title IV, the instances when the United States could sue a school district for desegregation if, by enacting Title VI, it was enabling the United States to bring a desegregation suit irrespective of any other conditions. Any language in the 1964 legislative history relating to judicial proceedings and to a preference for lawsuits over administrative fund terminations related to lawsuits *under Title IV*.[5]

IV of the Civil Rights Act of 1964. *See, e.g.*, 110 Cong. Rec. 1518, 1527 (remarks of Rep. Celler); *id.* 6815-18 (remarks of Sens. Douglas, Humphrey, and Stennis); *id.* 8614 (remarks of Sen. Sparkman).

[4] This fact also distinguishes *United States* v. *Stevenson*, 215 U.S. 190, 197 (1909), on which the Solicitor General relies (Br. in Opp. 10-11). *Stevenson* holds that statutes creating a right and providing a "special remedy for its enforcement," will not restrict "the government in the use of known rights and remedies" unless "the language . . . [is] clear and specific to that effect." Since the United States did not have a "known right" to bring any kind of desegregation suit, including an action for specific enforcement of a school district's assurance of nondiscrimination, before the 1964 Civil Rights Act became law, Congress did not have to bar the United States from suing public school districts for specific performance of Title IV assurances in order to establish that such an action could not be maintained.

[5] Senator Pastore, on whom the Solicitor General relies (Br. in Opp. 13), said (110 Cong. Rec. 7660 (1964); emphasis added):

> The way to avoid such a hardship [imposed by cutting off funds to public schools] will be for the Attorney General to institute a desegregation suit *under Title IV*, rather than to terminate the assistance.

No Senate sponsor contemplated that the United States would be able to bypass Title IV by claiming that a Title VI Assurance of Compliance was an open-ended contractual commitment enforceable by the United States.

4. The government's Brief in Opposition also misreads more recent legislative history—particularly the statements made by sponsors of anti-busing legislation. Senator Eagleton's statement quoted at page 15 of the Solicitor General's brief did not state or suggest that even while an Assurance of Compliance submitted to HEW could not be used to secure busing by administrative enforcement it could be read as a contract, enforceable in a suit by the Department of Justice, to bus for desegregation. Senator Eagleton said only that even with his proposed legislation HEW could ask the Department of Justice to institute litigation, and it is clear, we submit, that he was referring to litigation *under Title IV*, not to the purported action to enforce a contract, as is involved in this case.

5. There is, finally, no merit to the argument that "serious constitutional problems" would be raised if the Eagleton-Biden Amendment and its predecessors were understood to prevent busing lawsuits based on alleged violations of Assurances of Compliance submitted under Title VI. The Department of Justice remains free, if Title IV standards are satisfied, to initiate an action under those provisions of law. Moreover, legal claims made by private individuals are not affected in any way by the anti-busing amendments. Courts are free to grant remedies, where necessary and appropriate, at the instance of private parties. Barring the administrative remedy and any judicial

alternative which proceeds on the same assumption—*i.e.*, that the grant of federal funds entitles the federal government to demand the transportation of students—is not, in this light, remotely unconstitutional.

CONCLUSION

For the foregoing reasons as well as those stated in our Petition, the Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed September 18, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
(ABILENE DIVISION)

Civil Action No. CA1-80-53

UNITED STATES OF AMERICA, *Plaintiff*,

v.

BIG SPRING INDEPENDENT SCHOOL DISTRICT; LYNN C. HISE, SUPERINTENDENT; BOARD OF TRUSTEES, BIG SPRING INDEPENDENT SCHOOL DISTRICT, MRS. CAROL HUNTER, BOARD MEMBER; MR. DELBERT DONELSON, BOARD MEMBER; MR. AL VALDES, BOARD MEMBER; MR. CHARLES BEIL, BOARD MEMBER; MR. BERT HARRIS, BOARD MEMBER; MR. JERRY FORESYTH, BOARD MEMBER; DR. JAMES E. MATHEWS, BOARD MEMBER, *Defendants.*

Complaint

The United States of America by its attorneys alleges:

1) This is an action to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 USC §§ 2000d *et seq.*, the regulations of the United States Department of Health, Education, and Welfare* (hereinafter "HEW") in implementation thereof, 45 C.F.R. Parts 80, 81, the Fourteenth Amendment to the United States Constitution, and the contractual assurances and undertakings made by Defendant Big Spring Independent School District (hereinafter "BSISD") in consideration of its continued receipt of federal financial assistance.

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* The United States Department of Education currently performs the duties with respect to school desegregation under Title VI that were performed in this case by HEW.

[Filed December 2, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

Civil Action No. M-80-200-CA

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARSHALL (TEXAS) INDEPENDENT SCHOOL DISTRICT; TRUITT INGRAM, SUPERINTENDENT; THE BOARD OF TRUSTEES OF THE MARSHALL INDEPENDENT SCHOOL DISTRICT; E. E. MARSHALL, LOUIS A. WILLIAMS, MRS. O. H. CLARK, RICHARD BERRY, G. A. ROSBOROUGH, MEMBERS OF THE BOARD OF TRUSTEES, *Defendants*.

Complaint

The United States of America alleges that:

1. This is an action to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000-d *et seq.*; the regulations of the United States Department of Health, Education and Welfare (HEW) (now the Department of Education) in implementation thereof, 45 C.F.R. Parts 80, 81; the Fourteenth Amendment to the United States Constitution; and the contractual assurances and undertakings made by Defendant Marshall Independent School District (MISD) in consideration for the continued receipt of federal financial assistance.

• • •

[Filed September 23, 1980]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Civil Action No.

UNITED STATES OF AMERICA, *Plaintiff*,

v.

BOARD OF EDUCATION OF THE CITY OF CHICAGO, *Defendant*.

Complaint

The United States, by its attorneys, alleges:

1. This is an action brought by the Attorney General on behalf of the United States to enforce the provisions of Title IV of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6; Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*; the regulations of the United States Department of Health, Education and Welfare (now the Department of Education and hereinafter "HEW" with reference to all times before the change) which implement Title VI, 45 C.F.R. Parts 80 and 81; the Fourteenth Amendment to the United States Constitution, and the contractual assurances made by defendant Board of Education of the City of Chicago (hereinafter "Board of Education") in consideration of its continuing receipt of federal financial assistance.

• • •

[Filed May 23, 1978]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

Civil Action No. 78-22-C10-0C

UNITED STATES OF AMERICA, *Plaintiff*,

v.

MARION COUNTY SCHOOL DISTRICT; MARION COUNTY SCHOOL BOARD; DR. CAROLE A. PARRISH, Chairperson; JIM EBGLE, Vice Chairman; J. L. COLLUM, Member; SAM MANSFIELD, Member; CAROL FREIMUTH, Member; H. LEON ROGERS, Superintendent, Marion County School District,
Defendants.

Complaint (Injunctive Relief Sought)

The United States of America by its attorneys alleges:

1. This is an action to enforce the provisions of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-d *et seq.*; the regulations of the United States Department of Health, Education and Welfare (hereinafter "H.E.W.") in implementation thereof, 45 C.F.R. Parts 80, 81; the Fourteenth Amendment to the United States Constitution; and the contractual assurances and undertakings made by Defendant Marion County School District in consideration of its continued receipt of federal financial assistance.

• • •